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THE *LH. 1826*
PRESENT PRACTICE
AND
COSTS
IN THE
HIGH COURT OF CHANCERY;



WITH
Practical Directions and Remarks,

FOR THE
USE OF BARRISTERS AND GUIDANCE OF THE SOLICITOR
IN THE CONDUCTING A CAUSE, FROM THE
COMMENCEMENT TO ITS CONCLUSION:

AND
IN CONDUCTING PROCEEDINGS
IN LUNACY, AND MATTERS
UNDER THE JURISDICTION OF
THE COURT, OR OF THE LORD
CHANCELLOR; IN WHICH THE
PRACTICE OF THE COURT, (AND
PARTICULARLY BEFORE THE
MASTER) IS FULLY EXPLAINED.

CONTAINING A VALUABLE
COLLECTION OF USEFUL PRECEDENTS,

WITH
THE ADDITION OF MODERN CASES.

By SAMUEL TURNER, SOLICITOR.

SIXTH EDITION.

VERY CONSIDERABLY ENLARGED AND IMPROVED,

By ROBERT VENABLES, Esq.

ONE OF THE CLERKS IN COURT IN THE CHANCERY OFFICE.

VOL. I.

LONDON:

J. AND W. T. CLARKE,

LAW BOOKSELLERS AND PUBLISHERS,
PORTUGAL STREET, LINCOLN'S INN.

1825.

Stackell and Arrowsmith, Johnson's Court.

PREFACE

TO THE

PRESENT EDITION.

THE favourable reception which the former impressions of the following work have met with from the Profession, has encouraged the Editor to publish a sixth, and as he hopes, an improved Edition: if found useful in the form in which it was originally submitted by the late Mr. Turner, the Editor flatters himself it will be found not less so in the present shape. The whole has been re-cast and very carefully revised; many corrections, and very considerable alterations, have been made both in matter and arrangement, and some subjects have been introduced, which had before escaped attention. To notice all of them from the manner in which they are dispersed throughout every part of the work, would greatly exceed the limits of a preface: whatever may be the merits of the work, the size has been considerably increased by additional heads of

practice, numerous precedents of proceedings, and a voluminous accession of such cases as the Editor has been able to collect, since the publication of the last Edition; upwards of four hundred adjudged cases of practice have been scattered over fourteen hundred pages of letter-press; and to render the present volumes more deserving of attention, a very accurate Index is subjoined. With these additions, corrections, and improvements, the present Edition is submitted to the candour of the Profession: and the Editor, conscious of the imperfection of the work, and reviewing what he has done, is apprehensive that there are those to whom his labours may appear to have been exerted, only to increase occasion of censure, without hope or expectation of praise.

Six Clerks' Office,
Easter Term, 1825.

CONTENTS

OF THE

FIRST VOLUME.

	Page.
<i>Bill of costs for a plaintiff in a suit for carrying the trusts of a will into execution</i>	1
<i>A receiver's bill of costs</i>	59
<i>Bill of costs of petition by a party entitled under a decree, upon his coming of age</i>	64
<i>Practical observations and remarks on the above bill, and the proceedings generally on the part of the plaintiff</i>	67
<i>Bill of costs for the defendant in the above cause</i>	474
<i>Bill of costs for a defendant served with process and no bill filed</i>	510
<i>Practical directions and remarks on the same, and on the proceedings in general on the part of a defendant in a suit for the administration of assets</i>	511
<i>Bill of costs for a defendant, where bill dismissed for want of prosecution</i>	600
<i>Practical directions and remarks thereon</i>	613

	Page.
<i>Bill of costs for a plaintiff, where an issue was directed by the court</i>	- 624
<i>On the trial of the issue at law</i>	628
<i>Bill of costs for the defendant in the same cause</i>	- 639
<i>Bill of costs on a motion for a new trial of the issue</i>	- 648
<i>Practical observations and remarks on both bills</i>	- 652
<i>Bill of costs on petition for appointing a guardian to an infant</i>	668
<i>Practical directions and remarks thereon, and on appointing a guardian of the person and estate and maintenance of an infant</i>	672
<i>Bill of costs on a petition for an infant heir to convey mortgaged premises, pursuant to act of 7 Anne</i>	- 687
<i>Practical directions and remarks thereon</i>	- 690
<i>Bill of costs of petition under the entailed estate act, for payment of trust-money directed to be laid out in the purchase of land</i>	- 699
<i>Practical directions and remarks</i>	- 706
<i>Bill of costs on re-hearing a cause</i>	- 726
<i>Bill of costs for inrolling a decree, and of motion to vacate same</i>	- 729
<i>Bill of costs for exemplifying a decree</i>	- 731
<i>Practical observations and remarks</i>	- 732
<i>Bill of costs for discharging defendant's order for irregularity</i>	- 744
<i>Bill of costs for discharging plaintiff's order for irregularity and of messenger attending the great seal</i>	- 747
<i>Bill of costs for a creditor upon a charge of debt in the master's office, pursuant to an advertisement for creditors under a decree</i>	- 750
<i>The like of a mortgages coming in under a decree where a separate report made as to creditors</i>	- 752

CONTENTS.

vii

	Page.
<i>Practical remarks and observations on the foregoing bills</i>	- 756
<i>Bill of costs for a plaintiff resident out of the jurisdiction, upon giving security for the costs of suit</i>	- 760
<i>Practical observations and remarks thereon</i>	- 762
<i>Bill of costs for plaintiff, upon filing exceptions to an answer, and to the master's report</i>	- 766
<i>Bill of costs for defendants, upon overruling exceptions filed by co-defendant beyond the deposit, pursuant to an order made on the hearing</i>	- 771
<i>Bill of costs for plaintiff, on reference of bill for impertinence</i>	- 776
<i>Practical observations and remarks on reference for scandal and impertinence</i>	- 778
<i>Reference of answer for insufficiency</i>	- 783
<i>Reference of title in suits for specific performance</i>	- 783
<i>Reference of bill of foreclosure under 7 Geo. II.</i>	- 798
<i>Bill of costs for plaintiff, on proceeding against a peer or privileged person</i>	- 801
<i>Practical observations and remarks thereon</i>	- 803
<i>Plaintiff's bill of costs for setting down a demurrer and plea, and of argument of the plea</i>	- 805
<i>Practical directions and remarks on demurrers</i>	- 806
<i>Practical directions and remarks on pleas</i>	- 816
<i>Bill of costs upon taxation of a solicitor's bill, and taking the papers and proceedings out of his hands</i>	- 829
<i>Bill of costs of taxation of a solicitor's bill, where more than a sixth taxed off</i>	- 836
<i>Bill of costs of taxation of former solicitor's bill, where less than a sixth taxed off</i>	- 837
<i>Practical observations and remarks on all the bills</i>	- 839

	Page.
<i>Bill of costs of the committee on issuing a commission of lunacy</i>	- 881
<i>Bill of costs of the next of kin</i>	- 888
<i>Bill of costs of the committee, on passing his first account</i>	- 889
<i>The like for payment of balance into court</i>	- 891
<i>The like for vacating his recognizance</i>	- 892
<i>The like for suing out a commission of lunacy, and of the grant of the person and estate, and incidental proceedings</i>	- 894
<i>Practical directions and remarks for issuing a commission of lunacy, and the proceedings thereon, and in matters of lunacy generally</i>	- 905
<i>Bill of costs, for plaintiff in an injunction cause</i>	- 953
<i>The like for defendant in the same cause</i>	- 956
<i>Practical remarks thereon</i>	- 959
<i>Of the writ of ne exeat regno</i>	- 984

PRESENT PRACTICE
AND
C O S T S
IN THE
C O U R T O F C H A N C E R Y .

BILL OF COSTS FOR PLAINTIFFS,
In a Suit for carrying the Trusts of a Will into
Execution.

BETWEEN *John Lawrence, Sophia Lawrence, Rebecca Lawrence, and Lucy Lawrence, which said Sophia, Rebecca, and Lucy are Infants, by the said John Lawrence, their Brother and next Friend; Mary Lawrence, their Mother, John Stephens the Younger, and John Norris and Charlotte his Wife (formerly Charlotte Stephens,) Devisees and residuary Legatees, named in the Will of Stephen Lawrence, deceased.*

PLAINTIFFS.

AND,

George Wilson and William Johnson, Executors and Devisees in Trust, named in the Will of the said Stephen Lawrence; Stephen Lawrence, the Heir at Law and Devisee named in the said Will of the said Stephen Lawrence; John Stephens the Elder, William

Lawrence, a Bankrupt, and James Bakewell and Robert Harvey his Assignees; John Williams, Charles Williams, Joseph Williams, Jane Holroyd, the Wife of Joseph Holroyd, a Person of unsound Mind, by the said Joseph Williams her Guardian: Robert Venables, a Mortgagee of Part of the Testator's Estate; and the said Joseph Holroyd, out of the Jurisdiction of the Court.

DEFENDANTS.

By Original and Amended Bill and Bills of Revivor and Supplement.

	£	s.	d.
1819. } A TTENDING* Mr. John Lawrence, advising on the Will of his Uncle, Stephen Lawrence, and taking Instructions to state a Case thereon for the Opinion of Counsel - - - - -	0	6	8
Dec. 8th. } Perusing the Will, and Settlement made on his Marriage, being very long, as further Instructions - - - - -	0	13	4
	1	6	8
Drawing Case, four Brief Sheets -	0	13	4
Fair Copy thereof for Counsel -	2	4	6
Fee to Mr. Shadwell, and Clerk therewith -	0	6	8
Attending him - - - - -	0	3	4
Making Copy of Opinion for Plaintiff, at his request - - - - -	0	6	8
Attending Mr. John Lawrence, advising on Mr. Shadwell's Opinion; when he directed a Suit to be instituted in Chancery, agreeable to the Opinion - - - - -	0	5	0
Letters and Messengers - - - - -			

* The Commencement of this Bill down to Hilary Term, will not be allowed on Taxation, between Party and Party, and therefore forms no Part of the Bill taxed in the Cause.

FOR PLAINTIFFS.

3

In Chancery

LAWRENCE and Others, Plaintiffs.

v.

WILSON and Others, Defendants,

PLAINTIFF'S BILL OF COSTS.

HILARY TERM, 1820.

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Drawing Warrant to prosecute, and filling up same on Stamp -	0	7	6			
Perusing the Will, Marriage Settlement, and other Papers, and taking Instructions to draw Bill -	0	13	4			
Drawing same, and fair Copy, fo. 96 - - -	4	16	0			
Making Copy of the Will to accompany same, and for Use during the Cause, for Brief Sheets -	0	13	4	0	13	4
The like of Settlement, six Brief Sheets - - -	1	0	0	1	0	0
To Mr. Maddocks to settle and sign Bill - - -	4	4	0			
His Clerk - - -	0	2	6	0	2	6
Attending him (a). - -	0	6	8			
Engrossing Bill (6d. per sheet)	2	8	0			
Paid for Parchment and Duty, two Skins - - -	1	0	0			
Paid filing Bill - - -	0	7	4			
Drawing Præcipe for Subpoena, and attending to leave the same at Subpoena Office, and afterwards for same - - -	0	6	8			
Paid for three Subpoenas -	1	5	6			

(a) This fee will not be allowed between Party and Party in strict Costs.

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Service thereof on seven Defendants (a)	1	7	6			
Writing to Mr. George, of Bath, with one of the Subpœnas, instructing him to serve two of the Defendants who resided there - - - - -	0	3	6	0	3	6
Paid his Bill thereon to his Agent in Town, as per Receipt - - - - -	1	4	0	0	9	0
Paid for Attachment for want of Answer of Defendants (b)	0	12	2			
Attending Sheriff for Warrant there- on, and for return of <i>non est in- ventus</i> - - - - -	0	6	8	0	6	8
Paid for Warrant and for Return	0	13	0	0	13	0
Term Fee, Clerk in Court and Soli- citor (c) - - - - -	0	16	8			
Letters and Messengers - - - - -	0	5	0			

EASTER TERM, 1820.

Term Fee, Clerk, and Solicitor, De- fendants having obtained Orders for time - - - - -	0	16	8
Paid for Attachment, with Procla- mations - - - - -	0	16	11

(a) Personal Service in Town is 5s. Service by leaving the Body of the Subpœna at the House or Lodgings of the Defendant, 2s. 6d.—Personal Service in the Country is 10s. Service by leaving the Body of the Writ, 5s.

(b) The costs of process of contempt here inserted form no part of the general Bill of Costs between Party and Party; where the Party has been discharged or the answer accepted, the Costs can only be recovered as Costs in the cause, or lost altogether.

(c) A Term Fee of 6s. 8d. is charged for the Clerk in Court of the Term in which the Bill is filed; his Fee is not included in the Fee of 7s. 4d. paid filing Bill, as heretofore.

FOR PLAINTIFFS.

5

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Attending Sheriff therewith, and paid for Warrant thereon -	0	9	2	0	9	2
Paid Sheriff's Officer therewith	0	10	6	0	10	6
Letters and Messengers -	0	5	0			

TRINITY TERM FOLLOWING.

Instructions to Counsel to move that the Sheriff may return the Attach- ment - - -	0	2	6			
Fee to Counsel to move -	0	10	6			
Attending Counsel and Register to draw up and enter Order	0	6	8			
Paid for Order and Entry	0	6	6			
Personal Service upon the Sheriff of Middlesex - -	0	5	0			
Paid for Office Copy Answer of the Defendants the Executors,* fo. 210 - - -	11	15	0			
† Making Close Copy thereof	3	10	0			
Perusing and considering the same, in order to see if the Bill was fully answered - -	0	13	4	0	13	4
Writing to Mr. John Lawrence, at Norwich, with the close Copy of the Answer - -	0	3	6	0	3	6
Paid for Office Copy Answer of the Defendant, Stephen Lawrence, the Heir at Law, fo. 24 -	1	8	0			

* By the late Orders for regulating the Fees, 1s. 2d. is allowed for Office Copies of Bills, Answers, Exceptions, Depositions, and other Records, including Duty and Paper. See Orders for regulating Fees, &c.

† Close Copies will not be allowed, unless the Party resides in the Country.

BILL OF COSTS

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Making a close Copy thereof	0	8	0			
Perusing and considering the same to see if the Bill was fully an- swered - - -	0	6	8	0	6	8
Instructions for Counsel to move to take the Answer of the other De- fendants without Oath -	0	2	6			
To Mr. Maddocks to move -	0	10	6			
Attending Counsel and Register to draw up and enter Order -	0	6	8			
Paid for Order and Entry	0	6	6			
Paid for an Office Copy of the Answer of the Defendant, Charles Williams, fo. 12 - - -	0	14	0			
Paid for Commission of Rebellion	1	7	10			
Paid two Commissioners for their Trouble and Return -	0	13	4	0	13	4
Attending them for same -	0	6	8	0	6	8
Paid for an Office Copy of the An- swer of the other Defendants, fo. 15 - - -	0	17	6			
Making close Copy of the two An- swers - - -	0	5	0			
Perusing and considering the same	0	6	8	0	6	8
*Drawing Notice of Motion, that the Defendants, the Executors, might transfer to the Accountant- General the Stocks and Annuities admitted by their Answer to be standing in their own Names, be- ing Part of the Testator's Estate,						

* By the late Orders for regulating Fees, 2s. is allowed for drawing a special Notice of Motion, and in that Charge its length is not regarded; and 2s. copy and service on every Clerk in Court, each.

FOR PLAINTIFFS.

7

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Copy, and Service on Mr. Baynes, Defendant's Clerk in Court	0	5	0	0	1	0
Copy and Service on Mr. Jackson, Defendant Stephens' Clerk in Court - - -	0	2	0			
Drawing and engrossing Affidavit of the Service thereof, Duty and Oath - - -	0	7	8			
Paid filing the same, and for Office Copy - - -	0	6	6			
Perusing the Pleadings, and taking Instructions to draw Brief for Counsel on Motion -	0	6	8	0	6	8
Drawing Brief, two Sheets	0	13	4			
Copy thereof for Counsel -	0	6	8			
Copy of the Notice annexed To Mr. Shadwell therewith, and Clerk - - -	0	1	0	0	0	6
Attending him - - -	1	3	6	0	2	6
Attending Court on Motion, when Order was made -	0	6	8			
Paid for the Order - - -	0	13	4			
*Attending passing the same -	0	13	6			
Paid entering - - -	0	6	8			
Paid entering - - -	0	5	6			
It being necessary to amend the Bill in some Particulars, Instructions for Counsel to move for Liberty to amend Bill† - - -	0	2	6			

* On all special Orders an Attendance to pass the Order will be allowed; but on other Orders not.

† If the Amendment arises out of Matter disclosed by the Defendant's Answer, the Costs of Amendment will be allowed, *secus* if the Amendment appears to have been in the Party's Knowledge anterior to the filing the Bill; or of which, with common Diligence, he might have come at the Knowledge.

BILL OF COSTS

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Fee to Mr. Maddocks to move	0	10	6			
Attending him and Register to draw up and enter Order -	0	6	8			
Paid for Order, Entry, Copy, and Service * - -	0	10	6			
Perusing the Bill and making the Amendments therein †	0	6	8			
Paid Clerk in Court amending the Record and Office Copies	0	13	4			
Instructions for Counsel to move for Serjeant at Arms -	0	2	6			
Fee to Counsel to move -	0	10	6			
Paid for Order and Entry	0	6	6			
‡ Paid Serjeant at Arms for Return	6	6	6			
Term Fee, Clerk, and Solicitor	0	16	8			
Letters and Messengers -	0	6	0	0	1	0

TRINITY VACATION.

Instructions to Counsel to move for Sequestration . - -	0	2	6
Fee to Counsel to move -	0	10	6
Attending Court, with Serjeant at Arms Return - -	0	6	8
Paid for Order and Entry -	0	10	0

* Copy of the Order is 2s. and Service 2s. on every Clerk in Court.

† If the Amendments, in any one Place, exceed two Sheets, or 180 Words, there must be a new Ingrossment of the Bill.

‡ The Serjeant at Arms draws up the Order, and takes it from the Register, and applies to the Solicitor for Instructions. By the Order of Court, 12th June, 1694, the Register is to deliver the Order to the Serjeant at Arms, or his Deputy, and to no other Person, they paying for the same, to take out a Warrant thereupon. See Hands' Chan. for the Order, 38.

FOR PLAINTIFFS.

9

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Paid for Writ of Sequestration	1	3	10			
Abbreviating amended Bill, and Answers, fo. 96, 210, 24, 12, 15, =357 (at 4d. per folio) -	5	19	0			
Making two Fair Copies thereof for Counsel, Sixteen Brief Sheets each*	4	13	4			
To Mr. Maddocks with Brief of Pleadings to advise thereon, and on further Proceedings, and to amend if necessary - -	3	3	0	1	1	0
His Clerk - -	0	2	6	0	2	6
Attending him - -	0	6	8	0	6	8
Mr. Maddocks being of Opinion that the Bill must be again amended, by adding another Party Defendant (the Mortgagee of some Part of the Estate) drawing Petition † for Leave to amend, engrossing, and Duty - -	0	6	8			
Paid answering the same (at the Rolls) - - -	0	5	6			
Attending at Register Office to get Order drawn up - -	0	6	8			
Paid for Order, Entry, two Copies and Service - -	0	10	6			
Drawing Amendments to the Bill	0	13	4	0	6	8
Paid Clerk in Court, amending the Record and Office Copies -	0	13	4			

* Three Shillings and Fourpence is allowed for every Brief Sheet, which ought to contain 10 Chancery Sheets, except the Sheets containing the Title, and the Prayer of the Bill.

† Special Petitions are charged at 1s. per Folio drawing, and 4d. engrossing. But common Petitions for Orders of course are charged at a Sum *in solido* for drawing, engrossing, and duty.

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
*The Defendant living at Hackney, drawing and engrossing Petition for a Subpœna returnable immediately, and Duty - - -	0	6	8			
Drawing and engrossing Affidavit of the Defendant's Residence, in Support of the Petition, Duty and Oath - - -	0	7	4			
Paid answering Petition -	0	5	6			
Attending thereon, and to get Order drawn up - -	0	6	8			
Paid filing Affidavit -	0	2	0			
Paid for Order and Entry -	0	6	6			
Drawing Præcipe for Subpœna, and attending to leave same at Subpœna Office, and afterwards for same	0	6	8			
†Paid for a Subpœna at private Seal	0	11	6	0	3	6
Service thereof on the Defendant‡	0	2	6			
Paid for an Office Copy of his An- swer, fo. 30 - -	1	15	0			
Close Copy thereof - -	0	10	0	0	10	0
Perusing and considering the same	0	6	8	0	6	8
Abbreviating the same, fo. 30	0	10	0			
Making two fair Copies thereof, to add to the former Briefs of Plead- ings, two Sheets and a half each	0	16	8			
Letters and Messengers, (allowed be- fore in the Term) -	0	5	0	0	5	0

* The Costs of obtaining a Subpœna returnable immediately, are not allowed on Taxation between Party and Party.

† If the Subpœna had been sealed at a Gift Seal, 6d. only in addition to the ordinary Charge would have been paid. *Lord Eldon* has discontinued the Gift Seals.

‡ If there is only one Defendant, Personal Service is not allowed.

FOR PLAINTIFFS.

11

CHARGE.			TAX OFF.		
£	s.	d.	£	s.	d.

MICHAELMAS TERM, 1820.

Attending Mr. John Lawrence, advising on the Death of Mr. William Stephens, one of the Plaintiffs, and on the Alterations made on that Account in the In- terest of the Parties -	0	6	8	0	6	8
Perusing the Pleadings, and taking Instructions to draw Bill of Re- vivor against the personal Repre- sentative, the Defendant John Stephens the Elder -	0	6	8			
Drawing Bill and fair Copy, fo. 14	0	14	0			
Fair Copy thereof for Counsel to settle and sign - -	0	4	8	0	4	8
To Mr. Maddocks and Clerk therewith	1	3	6	0	2	6
Attending him - -	0	6	8			
Engrossing Bill - -	0	7	0			
Paid for Parchment and Duty	0	8	6			
Paid filing the same - -	0	7	4			
Drawing Præcipe for Subpœna, and attending to leave same at the Subpœna Office, and afterwards for same - -	0	6	8			
Paid for Subpœna - -	0	8	0			
Service thereof - -	0	2	6			
Instructions for Counsel to move to revive Cause - -	0	2	6			
Fee to him to move - -	0	10	6			
Attending him and Register to draw up and enter Order -	0	6	8			
Paid for Order,* Entry, 2 Copies, and Services - -	0	12	0			
Replication and Duty -	0	12	8			

* See Hands' Chan. for the Order, 16.

	CHARGES £ s. d.			TAX OFF. £ s. d.		
Instructions for Counsel to move for Subpoenas to rejoin, returnable immediately; and that Service thereof on the Defendant's Clerk in Court might be deemed good Service: and for a Commission to examine Witnesses, with leave to execute the same in Term Time	0	2	6			
Fee to Mr. Maddocks to move	0	10	6			
Attending him and Court -	0	6	8			
Paid for Order,* Entry, three Copies and Service - -	0	16	0			
Drawing Præcipe for Subpoena to rejoin: attending to leave same at Subpoena Office, and afterwards for same - -	0	6	8			
Paid for four Subpoenas to rejoin	1	12	0			
† Service thereof - -	0	10	0			
Taking Instructions for Interrogatories - - -	0	13	4			
Drawing same, and fair Copy, fo. 16, (at 1s. per fo.) ‡ - -	0	16	0			
Attending Mr. John Lawrence, informing him that the Suit was proceeding with all possible Dispatch, and that the Maintenance for the Infants should be the first Object of Attention § - -	0	13	4	0	13	4

* Two Shillings and Sixpence is allowed for the service of each Subpoena; and where one Subpoena is served on two Clerks in Court then 2s. 6d. is allowed for the Service on each Clerk in Court.

† See Hands' Chan. for the Order, 89.

‡ The late Orders allow 1s. per Folio, including fair Copy.

§ This attendance, as all others of a similar Nature, where no

FOR PLAINTIFFS.

13

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
To Mr. Maddocks, to settle and sign the same, and Clerk, and with a Brief of the Pleadings to advise on the necessary Evidence	2	4	6	0	2	6
Attending him - - -	0	6	8			
Engrossing Interrogatories, fo. 16	0	8	0			
Paid for Parchment, and Duty -	0	8	9			
Attending the Examiner therewith, and instructing him -	0	6	8			
Attending Mr. A. and Mr. B. two of the Witnesses to the Will, to the Prerogative Office to inspect the original Will, previous to their Examination -	0	6	8			
Writing a Letter to the third Witness at Chester, requesting his Attendance in Town, in order to save the Expence of a Commission, and Copy -	0	3	6			
Drawing Præcipe for Subpoena, and attending leaving same at Subpoena Office, and afterwards for same	0	6	8			

material or useful Information or Advice has been given, from which the Parties would derive any Benefit, was disallowed, as between Party and Party, and would not have been allowed, as between Solicitor and Client. In Country Causes, Attendances upon the Client are frequently charged, amounting altogether to a very considerable Sum; to support which, the Masters require the Solicitor to shew, that the several Attendances were necessary, and actually took place; that the Advice was *professionally* given, and in some Cases what that Advice was, that the Master may judge, as well of the Necessity, as of the Propriety and real Utility, and of the beneficial Result to the Client; or, as *Lord Eldon* expresses, whether such Advice was wholesome.*

* 3. Ves. and Bea. 171.

	CHARGE:			TAX OFF.		
	£	s.	d.	£	s.	d.
Paid for Subpoena against that Witness - -	0	8	0			
Writing to Mr. Wilbraham of Chester therewith ; instructing him to serve the same, and to request the Witness's Attendance in Town immediately - -	0	3	6	0	3	6
Paid him his Bill on that Occasion	0	17	0			
Attending the Witness on his Arrival in Town, and with him to the Prerogative Office, inspecting the Will	0	6	8			
Paid fees of inspection there	0	1	0			
Attending the Examiner, appointing a Time for the Examination of the Witnesses to the Will, in order to bespeak the original Will to be at the Examiner's office at the Time	0	6	8	}	0	6
Paid Examiner for Summons appointing Witness's attendance upon him	0	1	0			
Attending at the Prerogative Office giving Directions for the Will to be at the Office - -	0	6	8			
Paid on that Occasion* - -	1	0	0			
Attending the Witnesses to appoint them, and afterwards attending them to the Examiner's on their Examination - -	0	6	8	0	6	8
Paid Mr. C. the Witness from Chester, for loss of Time, his Expences, &c. as per Receipt	6	6	0			
Instructions for Counsel to move for Leave to examine the Defendant						

* If the original Will is in use more than one Day, 10s. is paid for the Attendance every subsequent Day to the Messenger from the Prerogative or other Offices.

FOR PLAINTIFFS.

15

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
John Stephens (who was a Witness to the Execution of the Marriage Settlement) for the Plaintiffs, saving just Exceptions -	0	2	6			
To Mr. Maddocks to move -	0	10	6			
Attending him and Register to draw up and enter Order* -	0	6	8			
Paid for Order, Entry, three Copies, and Service -	0	14	6			
Attending the Defendant thereon, and with him to the Examiner -	0	6	8			
Rule to produce Witnesses -	0	8	8			
Rule to pass Publication -	0	8	8			
Term Fee, Clerk, and Solicitor	0	16	8			
Letters and Messengers -	0	5	0			

MICHAELMAS VACATION FOLLOWING.

Paid for Six Clerks Certificate of Pleading being filed -	0	3	4			
Paid setting down Cause, and for the Register's Note -	1	5	8			
Drawing Præcipe for Subpoena to hear Judgment, attending leaving same at Subpoena Office, and afterwards for same -	0	6	8			
Paid for four Subpoenas to hear Judgment -	1	12	0			
Service thereof on ten of the Defendants -	1	15	0			
Drawing and engrossing Affidavit thereof, Duty, and Oath -	0	9	8			
Paid filing same, and for Office Copy	0	8	8			

* See Hands' Chan. for the Order, 97.

	CHARGE. £ s. d.	TAX OFF. £ s. d.
Attending at several Places to find out the Residence of the Defendant Charles Williams but without Effect - - -	0 6 8	
Attending Mr. R. his Solicitor, to request he would accept the Subpoena for the Defendant, which he declined, and enquiring of him where the said Defendant was to be found, which he likewise declined informing me -	0 6 8	} 0 6 8
Attending the said Defendant's Clerk in Court, making similar Enquiries - - -	0 6 8	
Drawing Petition to the Master of the Rolls, that Service of the Subpoena on the said Defendant's Clerk in Court might be deemed good Service, engrossing, and Duty	0 6 8	
Drawing Affidavit in support thereof, Engrossing, Duty, and paid two Oaths - - -	0 8 8	
Paid answering Petition -	0 5 6	
Attending thereon to get Order drawn up - - -	0 6 8	
Paid filing Affidavit -	0 5 0	
Paid for Order, and Entry *	0 6 6	
Copy, and personal Service thereof with the Subpoena, on the Clerk in Court - - -	0 4 6	
Drawing and engrossing Affidavit of the Service of the Subpoena, Duty and Oath - - -	0 7 8	
Paid filing same, and for Office Copy	0 6 8	

* See Hands' Chan. for the Order, 110.

FOR PLAINTIFFS.

17

HILARY TERM, 1821.

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Paid the Examiner's Bill,* for examining Witnesses, and Office Copy of Plaintiff's Depositions	4	17	8			
Paid for the Office Copy of the Defendant's Deposition, fo. 17	1	2	2			
Abbreviating Depositions, fo. 51	0	17	0			
Making two fair Copies thereof, to add to Briefs of pleadings, three Sheets each	1	0	0			
The Defendant William Lawrence having become Bankrupt, attending Mr. John Lawrence, conferring and advising thereon, and on the Necessity of filing a Supplemental Bill against his Assignees	0	6	8	0	6	8
Perusing the Pleadings, and taking Instructions to draw Supplemental Bill	0	13	4			
Attending the Solicitor under the Commission for the Names and Residence of the Assignees, the Date of the Commission and Assignment, when he informed me that James Bakewell, Esq. and Mr. Robert Harvey were the Assignees	0	6	8			
Drawing and Copy of Supplemental Bill, fo. 29 †	1	9	0			

* The Examiner's Bill must be produced before it can be allowed.

† The Copy is included in the 'ls. per fo. drawing. See Orders.

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Fee to Mr. Maddocks therewith, and Clerk - -	1	3	6	0	2	6
Attending him - -	0	6	8	0	6	8
Engrossing Bill - -	0	14	6			
Parchment, and Duty - -	0	9	6			
Paid filing Bill - -	0	7	4			
Drawing Præcipe for Subpœna, and attending to leave same at Subpœna Office, and afterwards for same - - -	0	6	8			
Paid for Subpœna - -	0	8	0			
Service thereof on Mr. James Bakewell, one of the Assignees	0	5	0			
Many Attendances on their Solicitor to request their Answer to be put in immediately so as not to render it necessary to adjourn the Cause	0	13	4	0	13	4
Writing Letter to Mr. George Vernon an Attorney at Stone, with Instructions to serve Subpœna on Mr. Robert Harvey at Gayton, the other Assignee -	0	3	6			
It being found necessary to adjourn the Cause on Account of the Answer not being filed in Time, drawing Petition for that Purpose, engrossing, and Duty -	0	6	8			
Paid answering the same -	0	10	0			
Attending thereon to draw up Order	0	6	8			
Paid for Order, Entry, three Copies, and Service * -	0	12	6			
Paid the Register marking the Cause adjourned - -	0	1	0			

* For the Order, see Hands' Chan. 109.

FOR PLAINTIFFS.

19

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Paid for Office Copy of the Answer of the Assignee, fo. 21 -	1	4	6			
Close Copy thereof * -	0	7	0	0	7	0
Abbreviating Bill, and Answer, fo. 29 21 = 50 -	0	16	8			
Two fair Copies thereof, to add to former Briefs, four sheets each	1	6	8			
Fee to Mr. Maddocks to peruse the Brief of Bill and Answer, and ad- vise on the Necessity of filing a Replication to the Answer	1	1	0	1	1	0
His Clerk - -	0	2	6	0	2	6
Attending him -	0	6	8	0	6	8
Replication, and Duty -	0	12	8			
Instructions for Counsel to move for Subpoena to rejoin, and that Ser- vice on the Defendant's Clerk in Court might be deemed good Ser- vice -	0	2	6			
To Mr. Maddocks to move -	0	10	6			
Attending him and Register to draw up and enter Order -	0	6	8			
Paid for Order, Entry, Copy, and Service † - -	0	8	6			
Paid for Subpoena -	0	8	6			
Service thereof -	0	2	6			
Rule to produce Witnesses -	0	8	8			
Attending the Assignees' Solicitor to get him to consent to pass Publi- cation immediately, which he agreed to, and attending the Clerks in Court thereon	0	6	8			

* Not allowed in a Town Cause.

† For the Order, see Hands' Chan. 89.

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Paid Clerk in Court Fee, consenting to pass Publication -	0	6	8			
Paid Clerk in Court for Office Copy of Defendant's Deposition, taken by Commission, fo. 74. -	4	6	4			
Abbreviating same -	1	4	8			
Two fair Copies to add to Brief, five Sheets each -	1	13	4			
Drawing Observations for Counsel, two Brief Sheets -	0	13	4			
Two Copies thereof annexed to Briefs -	0	13	4			
Fee to Mr. Shadwell with Brief, and Clerk -	8	10	6			
Attending him -	0	6	8			
Fee to Mr. Maddocks, with Brief and Clerk -	5	7	6			
Attending him -	0	6	8			
Attending the Counsel severally, to get a Consultation fixed * -	0	13	4			
Attending the Consultation at Sir Samuel Romilly's Chambers	0	13	4	0	13	4
Consultation Fee to Mr. Shadwell	2	2	0	2	2	0
The like to Mr. Maddocks -	2	4	6	2	4	6
To Mr Shadwell's Clerk and Servant on Consultation -	0	7	6	0	7	6
Making Copy of the Title of the Cause and Prayer of the Bill for the Chancellor -	0	3	4			
Attending at the Prerogative Office in Doctor's Commons, giving Instructions for the Original Will be-						

* The Costs of a Consultation will not be allowed in Costs between Party and Party.

FOR PLAINTIFFS.

21

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
ing brought to Lincoln's Inn Hall on the Hearing of the Cause	0	6	8			
Paid on that Occasion *	1	0	0			
March 9th and 10th, attending Court each of these Days, the Cause being in the Paper, but not called on, Clerk in Court and So- licitor	1	6	8			
—— 11th. Attending Court, Cause called on, and Part heard, Clerk in Court and Solicitor	1	0	0			
—— 12th. Attending Court, when the Cause was finally heard, and Decree made, Clerk in Court and Solicitor	1	0	0			
Paid Court Fees, and Officers †	0	13	0			
Paid the Clerk from the Prerogative Office for his Attendance with the Will three Days extra ‡	1	11	6			
Paid for Copy of the Minutes	0	12	0			
Making a Copy thereof for the Parties	0	3	6	0	3	6
Perusing the same, and attending the Defendant's Solicitor thereon, and afterwards on the Register, endeavouring to procure an Alter- ation to be made therein, but with- out Effect	0	13	4	0	6	8

* If this Attendance had been in the same Term as the Attendance on the Examiner (see ante, p. 14,) this Fee would have been no more than 10s.

† Only 10s. is allowed by the Rules and Orders of the Court.

‡ Strictly the Clerk's Fee is no more than 10s. for each of these Day's Attendance.

|| This is not allowed between Party and Party, nor between Solicitor and Client, unless particularly desired,

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Attending Mr. Maddocks, advising on the Minutes, when he recommended an Application to the Court to rectify the same -	0	6	8	0	6	8
Drawing Notice of Motion for that Purpose, three Copies, and Service - -	0	8	0			
Drawing and engrossing Affidavit of the Service thereof, Duty and Oath - -	0	7	2			
Paid filing same, and Office Copy	0	6	1			
Perusing Papers, and taking Instructions for Brief on Motion	0	6	8	0	6	8
Drawing same - -	0	6	8			
Fair Copy thereof for Counsel	0	3	4			
Copy of the Minutes for him	0	3	6			
Fee to Mr. Shadwell to move to rectify Minutes, and Clerk	1	3	6	0	2	6
Attending him -	0	6	8			
Attending Court on Motion, when the Minutes were ordered to be rectified as prayed -	0	13	4			
Paid for the Order * -	0	10	0			
Attending the Register, examining and passing same, and to procure the Minutes to be rectified agreeable thereto -	0	13	4			
Paid entering the Order -	0	3	0			
Paid for a Copy of the Minutes as rectified - -	0	13	0			
Making a Copy thereof -	0	3	6	0	3	6
Perusing and considering the same, and attending the Register and the Defendant's Solicitor finally settling the same -	0	13	4	0	13	4

* For the form of the Order, see Hands' Chan. 120.

FOR PLAINTIFFS.

23

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Paid for the Decree -	9	2	6			
Perusing and examining the Decree, with the Proceedings, previous to the same being passed	0	13	4	0	13	4
Attending passing the Decree, and examining the same with the Defendant's Office Copies the whole Morning -	0	13	4			
Attending to leave Decree to be entered - -	0	6	8			
Paid entering the same -	1	12	0			
Term Fee, Clerk, and Solicitor	0	16	8			
Letters and Messengers -	0	5	0			

EASTER TERM, 1821.

Making Copy of the ordering Part of the Decree for the Master *	0	5	0	0	2	6
Drawing Advertisement, for the Creditors to come in and prove their Debts - -	0	6	8	0	6	8
Paid Master's Clerk for Advertisement	0	10	6			
Attending the Master for the same, and afterwards on the Printer of the Gazette therewith -	0	6	8			
Paid inserting the same in the Ga- zette - -	1	3	0			
Paid for the Gazette -	0	0	9			
Making two Copies of the Advertise- ment - -	0	4	0			
Paid inserting the same in the Morn- ing Advertiser and the Morning Herald - -	0	14	0			
Attending the Printers therewith	0	6	8			

* The Masters always allow 2s. 6d. and will rarely allow more.

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Perusing the Pleadings, and taking Instructions to draw Interrogatories for the examination of the Defendants, the Executors	0	13	4			
Drawing same, fo. 16, and Copy for the Master - - -	0	16	0			
Warrant on leaving same, Copy, and Service * - - -	0	7	6			
May 10. Warrant to proceed thereon, Copy and Service -	0	4	6			
—— 12th. Attending thereon, but the Defendant's Solicitor did not attend - - -	0	6	8			
Another Warrant to proceed thereon, Copy and Service -	0	4	6			
—— 14th. Attending thereon, when the Interrogatories were settled and allowed -	0	6	8			
Paid for the Master's Certificate of Allowance, &c. -	1	10	6			
Paid the Master's Clerk engrossing the Interrogatories, Parchment and Duty - - -	0	16	0			
Attending the Master for his Certificate and to file same -	0	6	8			
Paid filing Certificate of Allowance, and for Office Copy -	0	4	10			
Warrant for the Defendants, the Executors, to bring in their Examination, Copy, and Service	0	4	6			
Term Fee, Clerk, and Solicitor	0	16	8			
Letters and Messengers	0	5	0			

* Duty of 1s. upon each Warrant, and the late Orders allow 1s. 6d. for Copy and Service of every Warrant on a Clerk in Court.

FOR PLAINTIFFS.

25

TRINITY TERM, 1821.

	CHANGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Another Warrant, for the Defendants, the Executors, to bring in their Examination, Copy, and Service	0	4	6			
Drawing peremptory Advertisement for Creditors -	0	6	8	0	6	8
Paid Master's Clerk for same	0	10	6			
Attending for the Advertisement, and afterwards on the Printer of the Gazette therewith -	0	6	8			
Paid inserting the same in the Ga- zette - - -	1	3	0			
Paid for the Gazette -	0	2	3			
Making two Copies of the Adver- tisement - - -	0	4	0			
Paid inserting the same in the Morn- ing Advertiser and the Herald	0	14	0			
Attending the Printers therewith	0	6	8			
Another Warrant for the Defendants, the Executors, peremptorily to bring in their Examination, Copy, and Service -	0	4	6			
Attending thereon, and the Master gave the Defendants three Weeks Time to bring in their Examina- tion, and the Solicitors signed the Master's Book, undertaking to bring in the Examination within that Time, and to pray no farther Time	0	6	8			
Paid for Office Copy of the Examina- tion of the Defendants, the Execu- tors, fo. 230 - - -	13	8	4			

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Fair Copy for Use -	3	16	8			
Perusing and considering the same, in order to see if the Interrogatories were fully answered; when it appeared that the Examination was very deficient -	1	1	0	0	6	8
Instructions for Counsel to move to refer the Interrogatories and Examination to the Master, to see if the same were sufficient or not - -	0	2	6			
Fee to him therewith -	0	10	6			
Attending him and Register, to draw up and enter Order -	0	6	8			
Paid for Order, Entry, Copy, and Service - -	0	8	6			
Drawing instructions for Counsel to attend the Master thereon -	0	2	6			
Fee to Mr. Maddocks therewith and Clerk - -	2	4	6	0	2	6
Attending him -	0	6	8			
Warrant to proceed thereon, Copy, and Service -	0	4	6			
Another Warrant to proceed thereon, Copy, and Service -	0	4	6			
Attending thereon, when Defendant's Solicitor did not attend -	0	6	8			
Peremptory Warrant, Copy, and Service - -	0	4	6			
Attending thereon, when the Master decided that the Examination was insufficient - -	0	6	8			
Paid for his Report, &c. -	1	10	6			

FOR PLAINTIFFS.

27

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Attending the Master for Report, and attending filing -	0	6	8			
Paid filing, and for Office Copy	0	5	10			
Instructions to Counsel to move that the Defendants might put in their Examination in four Days, or stand committed to the Ser- jeant at Arms -	0	2	6			
Fee to him therewith -	0	10	6			
Attending Court, reading Master's Report, and attending Register to draw up and enter Order -	0	6	8			
Paid for Order, and Entry -	0	6	6			
Copy and personal Service upon the Defendant's Clerk in Court *	0	5	0			
Attending Searching at the Master's Office, to be informed if the Exa- mination had come in, and found none -	0	6	8	0	6	8
Paid for Master's Certificate thereof and Clerk -	1	10	6			
Attending the Master for same, and attending filing -	0	6	8			
Paid filing, and for Office Copy	0	5	10			
Instructions to Counsel, to move that the Serjeant at Arms might take Defendants into Custody, &c.	0	2	6			
Affidavit of Service of Order, Duty, and Oath -	0	6	8			
Filing same, and for Office Copy	0	5	7			

* The Order directs the Service of the Order to be upon the Clerk in Court *personally*. See Hands' Chancery, 139, where the order is given verbatim.

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Attending Court reading Master's Certificate - -	0	13	4			
Paid for Order and Entry -	0	10	6			
Copy and personal Service upon the Defendant's Clerk in Court	0	5	0			
Paid for a Copy of their further Examination, fo. 12 -	0	14	0			
Fair Copy for Use -	0	4	0			
Perusing and considering the same	0	6	8			
Attending Mr. John Lawrence, conferring and advising on the Examination, and on the Necessity of compelling all Books and Papers, &c. to be left with the Master - -	0	13	4	0	6	8
Warrant for the Defendants, the Executors, to bring in all Books and Papers, Copy, and Service	0	4	6			
Second Warrant for the like Purpose	0	4	6			
Third Warrant for the like Purpose	0	4	6			
Attending at the Master's Office upon the Production -	0	6	8			
Paid for a Copy of Affidavit of the production of the Papers, &c. fo. 15	0	7	6			
Attending Mr. John Lawrence conferring on the Defendant's Examination, their Account, &c. when it was thought proper to have an Inspection of the Books and Papers left -	0	6	8	0	6	8
Warrant to inspect same, Copy, and Service - -	0	4	6			
Attending thereon, and inspecting the same - -	0	6	8			

FOR PLAINTIFFS.

29

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
The Decree having directed that, in taking the Accounts before the Master, it should be distinguished what was Principal and what was Interest of the Testator's Personal Estate, perusing and arranging the Accounts, scheduled to the Defendant's Examination, and making a very laborious Calculation of what was Principal, and what was Interest, previous to preparing the Charge -	2	2	0	2	2	0
Drawing Charge of Principal and Interest of the Personal Estate received by Defendant Wilson, one of the Executors, fo. 80, and fair Copy for the Master -	2	13	4			
Warrant on leaving the same, three Copies, and Service -	0	7	6			
Drawing the like Charge against the other Defendant and Executor Johnson, fo. 26 -	0	17	4			
Paid for Warrant on leaving same, three Copies, and Service	0	7	6			
Paid for two Warrants to proceed on the above Charges, three Copies, and Service -	0	15	0			
June 6th. Attending each Warrant, and proceeded -	0	13	4			
Paid for two other Warrants to proceed, Copies, and Service -	0	15	0			
— 8th. Attending thereon, when the same were allowed -	0	13	4			
Warrant for the Defendants, the Executors, to bring in their Discharge, Copy, and Service	0	4	6			

	CHARGE,			TAX OFF.		
	£	s.	d.	£	s.	d.
Another Warrant for that Purpose, Copy, and Service -	0	4	6			
Paid for a Copy of the Discharge of the Defendant Wilson, fo. 41.	1	0	6			
The like of Defendant Johnson, fo. 18 - -	0	9	0			
Attending Mr. John Lawrence con- ferring and advising thereon, and on several Items which appeared objectionable -	0	13	4	0	13	4
June 16. Attending Warrant on the Defendant Wilson's Discharge, and proceeded -	0	6	8			
The like on the defendant Johnson's Discharge -	0	6	8			
— 18th. The like Attendance on both Warrants, when the same were allowed -	0	13	4			
Paid for a Copy of the Defendant Venables' Charge of Principal and Interest due on his Mortgage on Part of the Testator's Estate, fo. 4.	0	2	0			
Copy thereof * - -	0	1	4	0	1	4
Attending a Warrant thereon, when the same was allowed -	0	6	8			
Paid for Office Copy of said Defen- dant's Costs at Law in disputing Mr. John Harvey's Agreement for renting the Farms at Leigh and Beamhurst, fo. 12 -	0	6	0			
Attending Warrant thereon, when the Master refused to allow the Costs, and directed the Bill to be taxed	0	6	8			

* Copies are allowed only in Country Causes.

FOR PLAINTIFFS.

31

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Attending at the Exchequer Office taxing same as between Attorney and Client, when the Costs were reduced from £33 15s. 7d. to £20 6s. 6d. - -	0	6	8			
Attending Mr. John Lawrence con- ferring and advising on the Situ- ation of the Infant Plaintiffs, and on a proper Maintenance to be allowed for them, in order to carry in a Proposal before the Master; and on the Necessity of obtaining a separate Report of the Debts and Legacies, in order to have the Allowance for the Main- tenance as early as possible	0	6	8			
Paid for a Copy of a Claim of Debt made by John Stephens, a Cre- ditor, on Bond and several Notes of Hand, fo. 10 -	0	5	0			
Paid for a Copy of his Affidavit made in Support thereof, fo. 8	0	4	0			
Attending Mr. John Lawrence, con- ferring and advising thereon, and on the Propriety of inspecting Mr. Stephens' Account in the Testator's Books	0	6	8	0	6	8
Warrant to inspect Books, Copy and Service -	0	4	6			
Attending thereon, when there ap- peared a Set-off to the Account	0	6	8			
June 14. Attending a Warrant on the Creditor's Claim, when the Set-off was admitted and allowed, and the Debt ascertained	0	6	8			

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Drawing State of Facts respecting the Infant Plaintiffs, and a Proposal for their Maintenance, fo. 20 - - -	0	13	4			
Attending Mr. John Lawrence, taking Instructions for his Affidavit in Support thereof -	0	6	8			
Drawing the same, fo. 10 -	0	10	0			
Attending him reading over and settling Affidavit -	0	6	8	0	6	8
Engrossing Affidavit, Paper, and Duty -	0	5	11			
Attending him reading over the Affidavit, and afterwards to the Master's Chambers to swear to the same - -	0	13	4	0	6	8
Paid Oath - -	0	1	0			
Warrant on leaving State of Facts and Proposal, and Affidavit, three Copies, and Service -	0	7	6			
Warrant to proceed thereon, Copies, and Service - -	0	7	6			
Attending thereon, when the same was allowed -	0	6	8			
Drawing Notice of Motion, that the Master might be at liberty to make a separate Report.* of the						

* Wherever the Situation of Infants for whom a Maintenance is ordered by the Decree requires an early Allowance of such Maintenance, the Solicitor should take care to have a Direction in the Decree that the Master shall be at Liberty to make a separate Report thereof, otherwise it cannot be done without a distinct Order being had for that Purpose, and at a heavy expence.

FOR PLAINTIFFS.

33

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Personal Estate, and Maintenance, three Copies, and Services -	0	8	0			
Drawing and engrossing Affidavit of the Service thereof, Duty and Oath.	0	7	8			
Paid filing same, and for Office Copy - - -	0	6	8			
Drawing Brief for Counsel to move, three Brief Sheets - -	1	0	0			
Fair Copy thereof for Counsel -	0	10	0			
Copy Notice annexed - -	0	1	0	0	0	6
Fee to Sir Samuel Romilly to move, and Clerk - - -	2	4	6	0	2	6
Attending him - - -	0	6	8			
Attending Court on Motion, when Order made - - -	0	18	4			
Paid for Order - - -	0	17	0			
Attending the Register, examining and passing the same -	0	18	4	0	6	8
Paid entering the Order -	0	3	6			
Making Copy of the Order for the Master - - -	0	2	6			
Paid him for a Copy of Draft of Re- port of Maintenance, &c. fo. 90	2	5	0			
Perusing and considering the same, and making many Alterations and Corrections therein -	1	1	0	1	1	0
Attending Mr. John Lawrence con- ferring and advising thereon	0	6	8	0	6	8
Warrant on Report being prepared, three Copies, and Services	0	7	6			
Three Warrants to settle the same, Copies, and Services -	1	2	6			
Attending thereon, when Report was settled - - -	1	0	0			

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Paid for Warrant to sign Report, three Copies, and Services	0	7	6			
Attending the Master's Clerk exa- mining the Transcript with the Draft Report as settled -	0	6	8			
Paid for Report * -	1	5	0			
Paid Transcribing same, and Stamps	1	7	6			
Gave Master's Clerk -	2	2	0			
Attending to file Report -	0	6	8			
Paid filing same, and for Office Copy	1	17	4			
Drawing Charge against the Defen- dant Johnson for Rents and Profits of the Testator's Estate received by him, fo. 12 -	0	8	0			
Warrant on leaving same, three Copies and Services -	0	7	6			
Warrant to proceed thereon, three Copies and Services -	0	7	6			
Attending thereon, when the Charge was allowed -	0	6	8			
Paid for a Copy of the said Defend- ant's Discharge, on Account of the Rents and Profits, fo. 8 -	0	4	0			
Close Copy thereof † -	0	2	8	0	2	8
Attending a Warrant thereon, when the same was allowed -	0	6	8			
Perusing the Papers, and taking In- structions to draw Interrogatories						

* By Lord Hardwicke's Orders, 1741, £1. 5s. after a Decree.

† In Country Causes Copies are allowed, not in Town Causes.

FOR PLAINTIFFS.

35

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
for the Examination of Witnesses to prove the Rental and Value of some Parts of the Estate, and a contingent Interest in a Sum of Money charged thereon	0	13	4			
Attending Mr. John Lawrence, con- ferring and advising thereon, and as to the stating a Case for the Opinion of Mr. Morgan, the Ac- tuary of the Equitable Society, on the Value of the contingent In- terest, previous to drawing the Interrogatories	0	6	8	0	6	8
Drawing Case, one Brief Sheet	0	6	8			
Fair Copy thereof for the Solicitor of the Defendants the Executors	0	3	4			
Attending him settling the same	0	6	8			
Copy thereof for Mr. Morgan's Opi- nion thereon	0	3	4			
Gave him therewith	2	2	0			
Attending him with the Case, and afterwards for the same, and his Opinion, and conferring and ad- vising thereon	0	13	4			
Drawing Interrogatories for the Examination of Mr. Morgan, and fair Copy, fo. 8	0	8	0			
Fee to Mr. Maddocks therewith, and Clerk	1	3	6	0	2	6
Attending him	0	6	8	0	6	8
Engrossing same	0	5	0			
Paid for Parchment and Duty	0	8	0			
Attending Mr. Morgan to fix a Time for his being examined, attending the Examiner thereon, and after-						

	CHARGE. £ s. d.	TAX OFF. £ s. d.
wards attending Mr. Morgan to the Examiner's Office *	0 13 4	
Paid Mr. Morgan for his Trouble in attending to be examined	2 2 0	
Warrant to enlarge Publication, three Copies, and Services -	0 7 6	
Attending thereon, and Publication enlarged for three Weeks -	0 6 8	
Paid for Master's Certificate that a Commission was necessary for the Examination of Witnesses in Staffordshire to prove the Rental and Value of the Estates, tran- scribing, &c. -	1 10 6	
Paid filing same, and for Office Copy -	0 4 10	
Attending the Master for same, and attending filing -	0 6 8	
Instructions for Counsel to move on the Master's Certificate, for a Commission to examine Witnes- ses in Staffordshire, and that the Defendant's Clerk in Court might name Commissioners within four Days -	0 2 6	
Attending Counsel therewith	0 6 8	
To Mr. Maddocks to move	0 10 6	
Attending him, and Court on Mo- tion † -	0 13 4	

* The Master himself may examine the Witness, but he cannot do so by his Clerk. 3 Ves. 603, 607.

† This Charge is allowed by the late Orders, and was allowed before, the Solicitor being supposed to attend with the Certificate.

FOR PLAINTIFFS.

37

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Paid for Order, Entering, three Copies, and Services -	0	11	0			
Attending at several Places to procure the Names of Commissioners, and attending the Clerk in Court with their Names and Descriptions, and to bespeak the Commission	0	6	8			
Paid for Commission -	1	6	9			
Taking Instructions for Interrogatories	0	13	4			
Drawing same, and fair Copy* fo. 18	0	18	0			
Fee to Mr. Maddocks and Clerk to settle and sign -	1	3	6	0	2	6
Attending him -	0	6	8	0	6	8
Engrossing Interrogatories	0	9	0			
Paid for Parchment and Duty	0	9	6			
Writing to Mr. Minshull, an Attorney at Rugeley, giving him very long Instructions for the Execution of the Commission, and Copy Letter -	0	5	0			
Taking Instructions for Petition to confirm the Master's Report of the Personal Estate, and Maintenance to be allowed for the Infant Plaintiffs -	0	6	8			
Drawing Petition, and fair Copy, fo. 86 -	4	6	0			
Engrossing same to present	1	8	8			
Paid for Paper, and Duty, two Sheets	0	5	10			
Copy of the Petition for the Master of the Rolls -	1	8	8			

* The late Rules and Orders, for regulating the Fees, allow 1s. per fo. for drawing, including fair Copy.

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Paid answering and setting down Petition - - -	0	6	6			
Attending to present the same, and afterwards for the same answered	0	13	4	0	6	8
Making three Copies of the Petition and Order thereon to serve	4	6	0			
Service thereof on three Clerks in Court - - -	0	6	0			
Drawing and engrossing Affidavit of the Service thereof, Duty, and Oath - - -	0	7	8			
Paid filing same, and for Office Copy	0	6	8			
Making Copy of the Petition for Counsel, eight Brief Sheets and a Half - - -	2	6	8			
Fee to Mr. Maddocks therewith, and Clerk - - -	2	4	6	0	2	6
Attending him - - -	0	6	8			
July 31st. Attending Court, Petition in the Paper but not called on	0	10	0			
August 1st. Attending Court, Petition heard and Order made	0	13	4			
Paid Court Fees, and Officers	0	7	0			
Paid for Order	1	15	0			
Perusing the same, and attending the Register passing -	0	6	8			
Attending leaving same to be en- tered - - -	0	6	8			
Paid entering the same -	0	9	0			
Attending the Accountant-General with the Order to direct the Sums standing in his Name to be carried over to the several Accounts, pursu- ant to the Order -	0	6	8			

FOR PLAINTIFFS.

39

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Paid for Certificate thereof, and Office Copy *	0	5	2			
Term Fee, Clerk, and Solicitor	0	16	8			
Letters and Messengers	0	5	0			

MICHAELMAS TERM, 1821.

Attending the Bearer of the Commission from the Country on its being returned executed, to procure him to be sworn at the Public Office	0	6	8			
Paid his Oath	0	1	0			
Paid him bringing up the Commission	0	5	0			
Warrant to enlarge Publication for a Week, three Copies, and Services	0	7	6			
Attending thereon and Publication enlarged accordingly	0	6	8			
Warrant to pass Publication, three Copies, and Services	0	7	6			
Attending thereon and Publication passed	0	6	0			
Paid Mr. Minshull of Rugeley, his Bill executing the Commission, &c.	12	8	9			
Paid Clerk in Court for an Office Copy of the Depositions of Witnesses taken under the Commission, fo. 66	3	17	0			
Abbreviating the same	1	2	0			
Perusing and considering the same, and making Minutes thereon	0	13	4	0	6	8

* There is a distinct Certificate for each carrying over.

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Attending Mr. John Lawrence, conferring and advising with him thereon - -	0	6	8	0	6	8
Paid the Examiner's Bill for the Examination of Mr. Morgan, and for Office Copy of his Deposition, fo. 8 *	1	18	4			
Abbreviating the Depositions	0	2	8			
Drawing State of Facts respecting the Testator's Freehold, Copyhold and Leasehold Estates, of which he died seized and possessed, and fair Copy, fo. 16 -	0	10	8			
Warrant on leaving same, three Copies, and Services -	0	7	6			
Warrant to proceed thereon, three Copies, and Services -	0	7	6			
Attending thereon, when the same was allowed -	0	6	8			
Drawing Particular of the Estates to be sold pursuant to the Decree, and fair Copy, fo. 15 -	0	10	0			
Warrant on leaving same, three Copies, and Services -	0	7	6			
Warrant to settle the same, three Copies, and Services -	0	7	6			
Attending thereon, when the same was settled	0	6	8			
Drawing Instructions for Advertisement for Sale of the Estates	0	6	8			
Paid the Master for Advertisement	0	10	6			

* See Order of Court, 22nd of April, 1811, for regulating the Fees of Attendance, &c. in the Examiner's Office. *Beames's Orders*, 475. *et infra*.

FOR PLAINTIFFS.

41

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Attending the Master for the same, and on the Printer of the Gazette therewith - -	0	6	8			
Paid inserting the same in the Gazette	1	3	0			
Paid for the Gazette -	0	1	2			
Making two Copies of the Adver- tisement - -	0	4	0			
Paid inserting same in the Daily Ad- vertiser and the Morning Herald	0	17	0			
Attending the Printers therewith	0	6	8			
Warrant to fix a Time for the Sale of the Estates, three Copies, and Services - .	0	7	6			
Attending Mr. John Lawrence, con- ferring and advising on the Par- ticular as settled, and on a Time most proper for the Sale	0	6	8			
Attending the Warrant, when the 26th of January, at Six, was ap- pointed - -	0	6	8			
Drawing Instructions for a peremp- tory Advertisement for the Sale	0	6	8			
Paid the Master for same -	0	10	6			
Attending him for the same, and afterwards on the Printer of the Gazette therewith -	0	6	8			
Paid inserting the same -	1	13	0			
Making four Copies of the Advertise- ment - -	0	8	0			
Paid inserting Advertisement in the Daily Advertiser, and the Morning Herald, and Suffolk Chronicle, Six Times - -	3	8	0			
Attending the Printers therewith	0	6	8			

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Making a Copy of the Particular of the Estates for the Printer	0	5	0			
Attending him therewith giving him Directions - -	0	13	4	0	6	8
Attending him afterwards, settling and correcting the proof sheet	0	13	4			
Paid the Printer his Bill as per Receipt - -	6	12	4			
Paid the Master's Clerk for Particulars of Sale for 14 Bidders *	4	10	0			
Drawing State of Facts, respecting the Rentals and Value of the Estates, directed by the Decree, to have that Inquiry made, and also of the Value of the contingent Interest in the Sum charged thereon respectively, fo. 24 -	0	16	0			
Warrant on leaving same, three Copies, and Services -	0	7	6			
Warrant to proceed thereon, three Copies, and Services -	0	7	6			
November 12th. Attending thereon but the other Solicitors did not attend - . -	0	6	8			

* The Composition Money formerly claimed by the Masters in lieu of written Copies of Particulars of Sale of Estates, has been altered, by Order of Court directing that the Solicitor for the Party prosecuting any Decree or Order for Sale should be at Liberty, in cases in which the Master should think fit, to print and disperse as many Particulars as should be thought beneficial under the Direction of the Master, in whose Office such Sale should be, *paying Sixpence per Side* for so many printed Copies as there should have been actual Bidders at the Sale and *no more*, and that such Payment should be allowed the Solicitor, upon the Taxation of his Costs. 24th March, 1814. *Beam. Orders*, 484.

FOR PLAINTIFFS.

48

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Another Warrant to proceed thereon, three Copies, and Services -	0	7	6			
November 14th. Attending thereon, and proceeded -	0	6	8			
Another Warrant to proceed thereon, three Copies, and Services -	0	7	6			
—— 16th. Attending thereon, when the Master allowed the State of Facts - -	0	6	8			
Warrant for the Defendants to bring in their Costs up to the Hearing, three Copies, and Services -	0	7	6			
Drawing the Plaintiff's Bill of Costs up to the Hearing, fo. 68 -	2	5	4			
Warrant on leaving same, three Copies, and Services -	0	7	6			
Three Warrants to tax Copies and Services - -	1	2	6			
Attending taxing Clerk in Court* and Solicitor - -	2	0	0			
Paid for a Copy of the Defendants the Executors, and several others their Costs, fo. 52 -	1	6	0			
Attending three Warrants, taxing the same, Clerk and Solicitor	2	0	0			
Paid for Copy Bill of Costs of De- fendant, the Assignee of Wil- liam Lawrence, fo. 16 -	0	8	0			
Attending Warrant to tax the same, Clerk, and Solicitor -	0	13	4			

* The Clerk in Court is obliged to attend in person, otherwise his Attendance will be disallowed. A Clerk or writing Agent upon Taxation of Costs, is not allowed.

BILL OF COSTS

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Paid for a Copy Bill of Costs of the Defendant Charles Williams, fo. 40	1	0	0			
Attending two Warrants, taxing the same, Clerk, and Solicitor	1	6	8			
Term Fee, Clerk, and Solicitor	0	16	8			
Letters and Messengers -	0	5	0			

HILARY TERM, 1822.

January 26th. Attending the Sale of the Estates at the Master's Chambers the whole Afternoon *	1	0	0	0	6	8
Drawing further Charge against the Defendant Johnson, for Rents and Profits received by him, fo. 6	0	4	0			
Warrant on leaving same, three Copies, and Services	0	7	6			
Warrant to proceed, three Copies, and Services -	0	7	6			
Attending thereon, when the Charge was allowed - -	0	6	8			
Paid for a Copy of the said Defendant's further Discharge in respect of the Rents and Profits, fo. 4	0	2	0			
Copy thereof † - -	0	1	4			
Attending thereon, when the same was allowed - -	0	6	8			
Paid for a Copy of the Master's General Report, fo. 150 -	3	15	0			

* Several of the Masters require that Warrants should be taken out to authorise this Charge: in which Case the Warrants, Copies, and Services, are charged, and 6s. 8d. for the Attendance on each Warrant.

† Copies are allowed in County Causes, not in Town Causes.

FOR PLAINTIFFS.

45

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Making Copy thereof .	2	10	0			
Warrant on preparing the same, three Copies, and Services	0	7	6			
Perusing and considering the Re- port, and making many Alterations and Corrections therein -	2	2	0	2	2	0
The Purchaser of Lots 1 and 2, at the Sale of the Estates, having given a Notice of Motion that he might, on paying the Purchase Money into Court, be let into Possession of the Estates, and into Receipt of the Rents from Christmas last; drawing Brief for Counsel to appear on the Motion and to consent thereto, and to pray that when the Money was paid in, it might be laid out, and carried to the Account directed by the Decree - -	0	6	8			
Fair Copy thereof for Counsel	0	3	4			
Making Copy of the Notice of Motion annexed -	0	1	0	0	0	6
Fee to Mr. Maddocks therewith	1	1	0			
Attending him - -	0	6	8			
Attending Court on Motion, when the Order was made as prayed	0	13	4			
Attending at the Accountant-Gen- eral's Office to search if the Money was paid in, and to request the same might be laid out pursuant to the Decree and Order	0	6	8			
Drawing Request for that Purpose, and Copy - - -	0	2	6			
Paid for Certificate of Investment	0	10	6			

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
The like of the Stock purchased being transferred to its proper Account - - -	0	10	6			
Ten Warrants to settle the Master's General Report, Copies, and Ser- vice - - -	8	15	0			
Attending thereon -	8	6	8			
Warrant to sign the Report, three Copies, and Services -	0	7	6			
Attending the Master's Clerk, exa- mining the Transcript of the Re- port with him previous to its being signed - -	0	6	8			
Paid for Report - -	1	5	0			
Paid Master's Clerk his Fee, and for transcribing Stamp, &c.	4	16	0			
Paid filing same, and for Office Copy	5	12	10			
Attending, filing Report, and for Copy - -	0	6	8			
Instructions for Counsel to move, to confirm Report nisi, and (the Defendants being many in Num- ber) that Service of the Order nisi on their Clerks in Court might be deemed good Service -	0	2	6			
To Mr. Maddocks to move -	0	10	6			
Attending him, and Register to draw up and enter Order -	0	6	8			
Paid for Order, Entry, three Copies, and Services - -	0	12	6			
Drawing and engrossing Affidavit of the Service thereof, Duty, and Oath	0	6	8			
Paid filing same, and for Office Copy	0	5	8			
Paid for Certificate of no Cause shewn	0	1	6			
Instructions for Counsel, to move to confirm Report absolute -	0	2	6			

FOR PLAINTIFFS.

47

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
To Mr. Maddocks to move -	0	10	6			
Attending him, and Register to draw up and enter Order -	0	6	8			
Paid for Order, Entry, three Copies, and Services -	0	12	6			
Drawing Petition to set the Cause down before the Master of the Rolls for further Directions, and subsequent Costs, engrossing, and Duty - -	0	6	6			
Paid answering same -	0	12	6			
Attending thereon, and to draw up Order - -	0	6	8			
Paid for Order for that Purpose, and Entry, three Copies, and Services	0	12	6			
Making a Copy of the Decree for the Master of the Rolls, fifty Sides (at 8d. each side) -	1	13	4			
The like of Report, eighty-six Sides (at 6d. each side) -	2	3	0			
Attending to leave the same	0	6	8			
Paid on leaving - -	0	5	0			
Paid setting down Cause for further Directions and subsequent Costs	0	2	0			
Drawing and engrossing Affidavit of the Service thereof, Duty, and Oath - - -	0	7	8			
Paid filing same, and for Office Copy thereof - -	0	6	8			
Drawing brief for Counsel, eight Sheets * - -	2	13	4			
Making two fair Copies thereof for Counsel - -	2	13	4			

* Each Brief Sheet should contain ten Chancery Sheets.

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
To Mr. Shadwell and Clerk with						
Brief - - -	6	8	6			
Attending him -	0	6	8			
To Mr. Maddocks and Clerk, with						
Brief - - -	4	6	6	0	2	6
Attending him - -	0	6	8			
Making two Copies of the Accountant- General's Certificate of the Monies carried to the different Accounts in his Name, for Counsel -	0	4	0			
February, 4th. Attending Court, Cause in the Paper but not called on, Clerk in Court, and Solicitor	0	13	4			
—5th. The like Cause heard, and Order made for the Defend- ants, the Executors and Devisees in Trust, to pay in their Balances, and for Payment of the Creditors with subsequent Interest, and re- ferring it to the Master to compute subsequent Interest on the Defend- ant Venables' Mortgage, who, on executing a Conveyance of the mortgaged Estates with the Appro- bation of the Master, was to be paid his Principal and Interest by Sale of a sufficient Part of the Stock in the Cause, &c. A Receiver to be appointed of the Estates remain- ing unsold, and various other Di- rections made, Clerk in Court and Solicitor - - -	1	0	0			
Paid Court Fees, and Officers *	0	13	4			

* By Lord Hardwicke's Orders, 1741, only 10s.

FOR PLAINTIFFS.

49

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Paid for Copy Minutes -	0	15	0			
Close Copy - - -	0	7	6			
Perusing and attending the Register, settling the same -	0	6	8			
Paid for Decree - -	8	12	6			
Perusing and examining the same with the Papers, and making many Corrections therein -	0	13	4	0	13	4
Attending the Register, and the Defendant's Solicitors, examining and passing the Decree -	0	13	4			
Paid entering the same -	1	12	0			
Copy ordering part of Decree for the Master -	0	2	6			
Attending Mr. Lawrence advising on a proper person to be appointed receiver of the Estates unsold	0	6	8			
Drawing Proposal for a Receiver, and copy for the Master, fo. 4 -	0	2	8			
Warrant on leaving three Copies and Services - -	0	7	6			
Warrant to proceed, three Copies and Services - -	0	7	6			
Attending thereon, when Defendant's Attorney attended and opposed same, and left a proposal for a different person to be appointed Receiver - -	0	6	8			
Paid for Copy thereof, fo. 5 -	0	2	6			
Writing to Mr. Lawrence informing him thereof - -	0	3	6	0	3	6
Attending Mr. Lawrence conferring and advising on Defendant's proposal, when it was determined to support our own Receiver -	0	6	8	0	6	8

BILL OF COSTS

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Warrant to proceed on Plaintiff's proposal for Receiver, three Copies and Services - -	0	7	6			
The like on Defendant's proposal, three Copies and Services -	0	7	6			
Attending both Warrants, Defendant's Attorney refused to proceed, and Master allowed our proposal, and disallowed Defendant's -	0	13	4			
Paid for Copy Receiver's Recognizance, fo. 12 - -	0	8	0			
Fair Copy - - -	0	3	4			
Attending to settle same -	0	6	8			
Paid for Copy of Report approving Receiver and Recognizance, fo. 10	0	5	0			
Fair Copy - - -	0	3	4			
The like of Report appointing Receiver, fo. 10 - -	0	5	0			
Attending settling same -	0	6	8			
Term Fee, Clerk and Solicitor	0	16	6			
Letters and Messengers -	0	6	0	0	1	0

EASTER TERM, 1822.

Attending the Register for his Certificate to sell Stock for Payment of the taxed Costs up to the Hearing, and afterwards attending the Accountant-General to bespeak the Sale - -	0	6	8			
Paid for Certificate of Sale, and filing same -	0	6	0			
Attending at the Accountant-General's to receive Plaintiff's Costs *	0	6	8	0	6	8

* This Fee is not allowed even between Solicitor and Client.

FOR PLAINTIFFS.

51

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Paid filing the Certificate of Payment thereof - -	0	4	6			
Paid for a Copy of John Stephens' Claim for subsequent Interest on his Bond, part of his Debt proved in the Cause, fo. 3 -	0	1	6			
Attending Warrant thereon, when the same was allowed -	0	6	8			
A separate Report being made of the subsequent Interest allowed, attending the Register with the Order made on further Directions for his Certificate to the Accountant-General to sell a sufficient Part of the Fund for the Payment of the Debts pursuant to the said Orders, and afterwards attending the Accountant-General to bespeak the Sale - -	0	6	8	0	6	8
Paid for a Certificate of Sale thereof	0	6	0			
Attending the Defendant Venables for his Mortgage Deeds and Papers, in order to prepare the Conveyance, pursuant to the Decree -	0	6	8			
Perusing same, as Instructions to draw the Conveyance -	0	13	4	0	6	8
Drawing the Release, six Skins, and fair Copy - -	6	0	0			
Copy thereof to lay before Counsel, by the Master's Direction, for his Perusal and Settlement, on behalf of all Parties -	1	10	0	1	10	0
To Mr. Shadwell, and Clerk, therewith - -	4	6	6			

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Attending him -	0	6	8			
Drawing Assignment of an outstand- ing Term from the Mortgagee's Trustee, three Skins -	3	0	0			
Fair Copy thereof for Mr. Shadwell's Perusal - -	0	15	0	0	15	0
Fee to him therewith, and Clerk -	2	4	6			
Attending him - -	0	6	8			
Drawing Lease for a Year to the Conveyance in Fee, one Skin	1	0	0			
Copy thereof for the Master -	0	5	0	0	5	0
Warrant on leaving the Drafts, Copy and Service -	0	4	6			
Warrant to settle the Lease for a Year, Copy and Service -	0	4	6			
Attending thereon, when the same was settled - -	0	6	8			
Three Warrants to settle the Release, Copies and Services -	0	12	6			
Attending thereon when the same was settled - -	1	0	0			
Two Warrants to Settle the Assign- ment of the Term, Copies and Services - -	0	9	0			
Attending thereon, when the same was settled - -	0	13	4			
Attending examining the Engross- ment of the Deeds with the Mas- ter's Clerk, ten Skins * -	1	13	4			
Five Warrants to Examine, and Services - - -	1	2	6			

* By the late Orders for regulating the Fees, 10s. is allowed for examining the Engrossment of Deeds with the Draft for every three Skins. See the Orders infra.

FOR PLAINTIFFS.

53

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Paid the Master's Clerk thereon	1	13	4			
Paid for a Copy of the Mortgagee's Charge of subsequent interest, fo. 3	0	1	6			
Close Copy thereof for the Country	0	1	0	0	1	0
Attending a Warrant thereon, when the same was allowed	0	6	8			
Paid for Report thereof, and of the Allowance of the Deeds and Clerk	3	9	6			
Attending filing Report, and for Office Copy	0	6	8			
Paid filing the same, and for Office Copy of Report	0	8	10			
Paid Master's Clerk for Engrossing the Deeds, Parchment, Duty, &c.	19	14	8			
Attending the Defendant, the Mortgagee, reading over, and executing all the Deeds	1	0	0			
Drawing and Engrossing Affidavit thereof, Duty, and Oath	0	8	8			
Warrant on leaving Copy of Service	0	4	6			
Warrant to examine Affidavit, Copy and Service	0	4	6			
Paid for Report of due Execution, Transcribing, Stamp, and Clerk	2	1	6			
Attending to procure and file same	0	6	8			
Paid filing, and for Office Copy	0	8	10			
Attending the Accountant-General, to sell sufficient of the Stock to pay the Defendant, the Mortgagee	0	6	8			
Paid for Certificate of Sale	0	7	0			
Paid filing Certificate of Payment	0	4	6			
Attending Mortgagee to receive the Money	0	6	8			

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
The Defendants, the Executors, not having paid in their Balances, drawing Notice of Motion that they might be directed to pay into Court their Balances in a Fort-night, Copy and Service	0	4	0			
Drawing and engrossing Affidavit of the Service thereof, Duty and Oath - - -	0	7	8			
Paid filing same, and for Office Copy	0	6	8			
Drawing Brief for Counsel to move, two Sheets - -	0	13	4			
Fair Copy for Counsel -	0	6	8			
Copy Notice annexed -	0	1	0	0	0	6
To Mr. Shadwell, to move -	1	1	0			
Attending him - -	0	6	8			
Attending at the Accountant-General's for a Certificate of the Money not being paid -	0	6	8			
Attending Court on Motion, when the Order was made to pay the Money in three Weeks -	0	13	4			
Paid for the Order -	1	12	6			
Attending the Register, examining and passing the same -	0	6	8			
Paid entering - -	0	7	0			
Copy and Service -	0	14	0			
Attending Clerk in Court to bespeak Writ of Execution of the Order, and leaving the Order, &c. with him - -	0	6	8			
Paid Clerk in Court for Writ of Execution of the Order *	2	13	4			

* These Costs when the Defendants are brought into Contempt, as they were in this Case, by the issuing the Attachment,

FOR PLAINTIFFS.

35

	CHARGE.	TAX OFF.
	£ s. d.	£ s. d.
Making two Copies thereof	0 10 0	
Personal Service on the two Defendants	0 10 0	
Attending at the Accountant-General's Office, to enquire whether the Executors had paid in their Money, when it appeared they had not; and attending afterwards for a Certificate of that Fact	0 6 8	
Drawing Affidavit of the Service of the Writ of Execution, Engrossing, Duty, and Oath	0 6 8	
Paid filing same	0 4 0	
Paid for Attachment against the two Defendants	0 12 2	
Warrant thereon, and Messenger	0 3 6	0 3 6
Attending the Sheriff's Officer, instructing him	0 6 8	0 6 8
The Defendants having at length paid in their Balances, drawing Request to lay out the Money which was Principal to be carried to that Account	0 2 6	
Attending the Accountant-General therewith, and to bespeak the Purchase	0 6 8	
Paid for a Certificate of laying out the Money, and of Purchase of Bank Annuities therewith	0 11 0	
Drawing Request to lay out the Money which was Interest to that Account	0 2 6	

the Court will make the Defendants pay. *Secus*, if the Order is complied with; the Costs of the writ of Execution are then borne by the Party suing out the Writ; but no Poundage is paid to the Sheriff, for executing the Attachment.

	CHARGE. £ s. d.	TAX OFF. £ s. d.
Attending the Accountant-General therewith, and to bespeak the Purchase - - -	0 6 8	
Paid for the Certificate of laying out the Money, and the like of In- vestment - - -	0 6 0	
Drawing Request to lay out the Money arising from Rents and Profits of the Testator's Estates to that Account - - -	0 2 6	
Attending the Accountant-General therewith, and to bespeak the Purchase - - -	0 6 8	
Paid for the Certificate of laying out the same, and the like of In- vestment - - -	0 11 0	
Attending the Sheriff's Officer, to re- quest the Defendants might not be arrested - - -	0 6 8	0 6 8
Paid him for his Trouble in enquir- ing after them several Times	0 10 6	0 10 6
Drawing Bill of Costs against the Defendants, the Executors, for their Contempt, fo. 4 - - -	0 2 8	
Attending taxing the same with the Clerk in Court - - -	0 6 8	
Paid Clerk in Court attending thereon	0 6 8	
Attending afterwards, settling and receiving the taxed Costs	0 13 4	0 13 4
The Purchaser of the remaining Lots at the Sale having applied for Li- berty to pay in his Purchase Mo- ney, and that he might be let into Possession of the Estates pur- chased by him, Drawing Brief for Counsel thereon, to request that		

FOR PLAINTIFFS.

57

	CHARGE. £ s. d.	TAX OFF. £ s. d.
the Money might be laid out, and that the Court would give Direc- tions accordingly -	0 6 8	
Fair Copy thereof, for him -	0 3 4	
Fee to Mr. Maddock therewith	0 10 6	
Attending him - -	0 6 8	
Attending Court when Order made, directing the Money, when paid in, to be laid out -	0 6 8	
On the Money being paid into Court, drawing Request to lay out same - -	0 2 6	
Attending the Accountant-General therewith, and to lay out the Money - -	0 6 8	
Paid for a Certificate of laying out the same, and the like of Invest- ment - - -	0 11 0	
Drawing Bill of Costs, subsequent to the Hearing, and fair Copy, fo. 106 * - -	3 10 8	
Warrant on leaving same, three Copies and Service -	0 7 6	
Four Warrants to tax same, Copies and Service -	1 10 0	
Attending thereon, Clerk in Court, and Solicitor -	2 13 4	
Paid for a Copy of the Costs of the Defendants, the Executors, and Others, fo. 68 -	1 14 0	

* By the late Orders for regulating Fees, Drawing and fair Copy of Bills of Costs between Party and Party at 8d. per folio is allowed.

BILL OF COSTS

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Attending two Warrants taxing same, Clerk and Solicitor -	1	6	8			
Paid for a Copy Bill of Costs of the Defendant, the Assignee of Wil- liam Lawrence, fo. 40 -	1	0	0			
Attending two Warrants, taxing the same, Clerk and Solicitor -	1	6	8			
Paid for a Copy Bill of Costs of the Defendant Charles Williams, fo. 80 -	0	15	0			
Attending taxing the same, Clerk and Solicitor -	0	13	4			
Paid for Report thereof, and Clerk	2	0	6			
Paid filing same, and for Office Copy	0	5	10			
Attending filing Report	0	6	8			
Attending the Register for his Cer- tificate, and afterwards on the Accountant-General, to procure a Sale of a sufficient Part of the Fund to pay the Costs	0	6	8			
Paid for Certificate of Sale, and for Office Copy -	0	6	0			
Paid filing Certificate of having re- ceived the same -	0	4	0			
Term Fee, Clerk, and Solicitor	0	16	8			
Letters and Messengers	0	6	0	0	1	0

FOR PLAINTIFFS.

59

Bill of Costs of Appointment of Receiver, to be paid by him, and charged in passing his first Account before the Master.

MICHAELMAS TERM, 1821.

	£	s.	d.
Paid for Copy of Draft of Recognizance, fo. 10	0	8	0
Fair Copy	0	4	0
Warrant on Preparing same, Copies and two Services	0	6	0
Warrant to settle, two Copies and Services	0	6	0
Paid Drawing and Engrossing Recognizance	0	10	0
Parchment and Duty	2	0	0
Paid for the Master's Allowance	0	2	6
Paid Drawing and Engrossing Affidavit of Sureties, and Duty	0	9	4
Paid for Master's Allowance	0	2	6
Paid for Draft Report, approving Receiver, and Allowing Recognizance and Affidavit, fo. 10	0	5	0
Fair Copy	0	3	4
Warrant on preparing same, two Copies and Services	0	6	0
Warrant to settle, two Copies and Services	0	6	0
Attending thereon	0	6	8
Warrant to sign Report, two Copies and Services	0	6	0
Attending thereon	0	6	8
Paid for Report, Transcribing, Stamps, and Clerk	2	1	6
Attending to procure and file same	0	6	8
Paid Filing, and for Office Copy	0	10	0
Warrant to enter into Recognizance, two Copies and Services	0	6	0

BILL OF COSTS

	£	s.	d.
Attending thereon - -	0	6	8
Paid for two Oaths, and three Cognizors *	0	9	6
Paid Master's Clerk, attending to inrol Recognizance and Receipt - -	0	10	0
Paid for Draft Report, appointing Receiver, fo. 10 - - -	0	5	0
Fair Copy - - -	0	3	4
Warrant on preparing, two Copies and Services	0	6	0
Warrant to settle, two Copies and Services	0	6	0
Attending thereon - -	0	6	8
Warrant to sign, two Copies and Services	0	6	0
Attending thereon - -	0	6	8
Paid for Report, Transcribing, Stamps and Clerk	2	1	6
Attending for Report and filing same	0	6	8
Paid for Office Copy - -	0	10	0
Letters and Messengers - -	0	5	0

MICHAELMAS TERM, 1822

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Drawing Receiver's Account, and fair Copy for the Master, fo. 70. †	2	6	8			
Warrant on leaving the same, three Copies and Services -	0	7	6			
Two Warrants to proceed thereon, three Copies and Services -	0	15	0			
Attending thereon -	0	13	4			
Paid entering the Account in the Master's Book -	1	15	0			

* *If taken in the Country.*—Attending to get Affidavit sworn, and Recognizance entered into 0 6 8

Paid swearing Affidavit, and for three Cognizors 0 11 6

† The late Orders do not mention the drawing Receiver's Accounts, but 8d. is allowed.

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Entering the same in a Book for the Receiver - -	1	3	4			
Paid for two Books to enter Accounts in - -	0	8	0			
Drawing and Engrossing Affidavit, verifying the Account, and Duty	0	9	4			
Paid Oath before a Master Extraordinary in the Country -	0	2	0			
Paid for Master's Allowance of the Account - -	0	5	0			
Drawing this Bill of Costs and Copy, fo. 7 - -	0	4	8			
Warrant on leaving the same, three Copies and Services -	0	7	6			
Warrant to tax, three Copies and Services - -	0	7	6			
Attending Taxing - -	0	6	8			
Paid for Copy Draft Report, fo. 14	0	7	0			
Fair Copy - - -	0	4	0			
Warrant on the same being prepared, three Copies and Services	0	7	6			
Warrant to settle the same, three Copies and Services -	0	7	6			
Attending thereon -	0	6	8			
Warrant to sign Report, three Copies and Services - -	0	7	6			
Attending thereon - -	0	6	8			
Paid for Report, Transcribing, &c.	1	7	6			
Master's Clerk - - -	2	2	0			
Paid filing, and for Office Copy	0	12	4			
Attending to file same -	0	6	8			
Attending to procure Accountant-General's directions for paying balance at the Bank, and to pay in same	0	13	4			

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Paid filing Certificate - -	0	6	0			
Postage of Letters, and Messengers	0	6	0	0	1	0

N. B. The Receiver will be allowed any extra Expence which he has been put to in ascertaining the Propriety of Allowances to be made to the Tenants, and for any Journies necessarily had on that Account, to be verified by Affidavit, and Production of Vouchers.

The Receiver's Bill of Costs on passing his last Account, and for vacating his Recognizance.

N. B. So much of the Bill as respects the passing the Account will be the same as above, with such Alterations as the Variation of Circumstances may require: That part of it respecting the vacating of the Recognizance will be as follows:

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Attending and taking Instructions for Petition to vacate the Recognizance - -	0	6	8			
Drawing same, fo. 30 -	1	10	0			
Engrossing same, Paper and Duty	0	12	8			
Attending to present Petition, and afterwards for same answered	0	6	8			
Paid answering and setting down Petition at the Rolls -	0	10	0			
Copy for the Master of the Rolls	0	10	0			
Making four Copies of the Petition, with his Honour's Order thereon to serve - -	2	0	0			
Service thereof on four Clerks in Court - -	0	8	0			

FOR PLAINTIFFS.

63

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Drawing and Engrossing Affidavit of Service, Duty and Oath	0	8	8			
Paid filing the same, and for Office Copy - -	0	7	8			
Attending searching for the Inrolment of the Recognizance	0	6	8			
Paid for an Office Copy thereof	0	18	0			
Brief Copy Petition for Counsel on the Hearing - -	0	10	0			
Fee to Mr. Maddocks therewith, and Clerk - -	1	3	6			
Attending him - -	0	6	8			
Attending Court on the Hearing	0	18	4			
Paid Court Fees and Officers *	0	8	0	0	1	0
Paid for Minutes of the Order	0	3	6			
Copy Minutes - -	0	2	0			
Attending Settling - -	0	6	8			
Paid for Order thereon -	2	3	6			
Attending the Register, examining and passing same -	0	13	4	0	6	8
Paid Entering -	0	16	6			
Paid Clerk of the Inrolment, vacating Fee and other Officers' Fees	1	16	0			
Attending thereon -	0	6	8			
Drawing Bill of Costs and Copy, fo. 8. - -	0	5	4			
Warrant on leaving, Copy and Service - -	0	4	6			
Warrant to tax Costs, Copy and Service - -	0	4	6			
Attending taxing -	0	6	8			
Letters and Messengers -	0	5	0			

* The Fees in Court are 13s.; at the Rolls, 7s.

Bills of Costs on a Petition by a Party entitled to Part of the Funds in the Cause, on his attaining his Age of Twenty-One Years.

MICHAELMAS TERM, 1822.

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Perusing Papers, and taking Instructions for Petition -	0	13	4	0	6	8
Drawing same, fo. 65 -	3	5	0			
Engrossing same, to present, Paper, and Duty -	1	6	10			
Attending to present Petition, and afterwards for same -	0	6	8			
Paid answering, and setting down the same at the Rolls -	0	6	6			
Making Copy of the Petition for the Master of the Rolls -	1	1	8			
Making two Copies thereof, to serve	2	3	4			
Service thereof on two Clerks in Court - -	0	4	0			
Drawing and Engrossing Affidavit of the Service thereof, Duty and Oath - -	0	8	8			
Paid filing same, and for Office Copy	0	7	8			
Attending at the Parish of St. Ippolitts, searching the Register of Baptisms, &c. and paid for Extract - -	0	7	8			
Drawing and Engrossing Affidavit, verifying the Extract in Support of the Petition, Duty and Oath	0	9	8			
Paid filing same, and for Office Copy	0	8	8			

FOR PLAINTIFFS.

65

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Brief Copy of the Petition for Counsel - -	1	1	8			
Making Copy of the Accountant-General's Certificate of the Funds annexed to Brief - -	0	1	0			
Fee to Mr. Maddocks, with Brief, and Clerk - -	3	5	6			
Attending him - - -	0	6	8			
Attending Court when the Petition was heard, and Order made -	0	13	4			
Paid Court Fees and Officers -	0	7	0			
Paid for the Minutes - -	0	8	0			
Attending Register settling the Minutes - - -	0	6	8			
Paid for Order - - -	3	4	0			
Attending the Register, examining, and passing same - -	0	6	8			
Paid entering Order and for Expedition* - - -	1	5	0	0	7	6
Attending the Register for his Certificate, and afterwards on the Accountant-General therewith, and with the Order directing the Transfer to be made -	0	6	8			
Paid for Certificate of Transfer, and filing same - - -	0	7	0			

* No Charge for Expedition paid to any of the Officers for accelerating the drawing, or entering, or filing any Order, Report, or other Proceeding, can be allowed. A Complaint to the Court for any Neglect, by wilfully withholding the drawing, or entering, or filing, would be very favourably received; and the Officer in whose Department it occurred, would be dismissed or very severely reprimanded: it has of late become a most intolerable Grievance and calls loudly for Redress.

66 BILL OF COSTS FOR PLAINTIFFS.

				CHARGE.			TAX OFF.		
				£	s.	d.	£	s.	d.
Attending on the Payment of the									
Money, and filing the Certificate									
thereof	-	-	-	0	6	8			
Paid filing same	-	-	-	0	3	6			
Term Fee, Clerk and Solicitor				0	16	8			
Letters and Messengers	-			0	5	0			

**PRACTICAL
OBSERVATIONS AND REMARKS**

APPLICABLE TO THE FOREGOING

BILLS OF COSTS;

AND TO

*The Pleadings and Proceedings in general on the Part of a
Plaintiff in the Court of Chancery.*

To convey to the junior Practiser the most perfect Comprehension of a Suit in the Court of Chancery, will be, to transcribe in the Words of a noble and learned Judge*, who has attained the highest Rank in his Profession, “ That a Suit to the extraordinary Jurisdiction of the
“ Court of Chancery, on Behalf of a Subject merely, is
“ commenced by preferring a Bill, in the Nature of a Peti-
“ tion, to the Lord Chancellor, Lord Keeper, or Lords
“ Commissioners for the Custody of the Great Seal, or to
“ the King himself in his Court of Chancery, in Case the
“ Person holding the Seals is a Party, or the Seals are in
“ the King’s Hands. But if the Suit is instituted on Be-
“ half of the Crown, or of those who partake of its Pre-
“ rogative, or whose Rights are under its particular Pro-

* The Right Honourable Lord Redesdale, late Lord High Chancellor of the Kingdom of Ireland.

“ tecton, as the Objects of a Public Charity (a), the Matter
 “ of Complaint is offered to the Court by way of *Informa-*
 “ *tion*, given by the Proper Officer (the Attorney or Solicitor-
 “ General,) and not by Way of Petition. If the Suit does
 “ not immediately concern the Rights of the Crown, its
 “ Officers depend on the Relation of some Person whose
 “ Name is inserted in the Information, and who is termed
 “ the *Relator* (b): in this Case his personal Complaint, being
 “ joined to, and incorporated with, the Information given
 “ to the Court by the Officer of the Crown, they form
 “ together an *Information and Bill*, and are so termed (c).”

A few preliminary Observations, introductory to the preparing and framing a Bill in Chancery, may be considered as an excusable Digression when addressed to the junior Branches of the Profession, for whose Use and Instruction the following Treatise is principally intended.

An Original Bill, praying the Decree of the Court, touching Rights claimed by the Person exhibiting the Bill, in opposition to Rights claimed by the Person against whom the Bill is exhibited, must show the Right of the Plaintiff or Person exhibiting the Bill, by whom and in what Manner he is injured, or in what he wants the Assistance of the Court; and that he is without Remedy, except in a Court of Equity, or at least is properly relievable, or can be most effectually relieved there (d): every necessary Circumstance, as Time, Place, Manner, and other Incidents (e), ought to be plainly, yet succinctly alleged (f); whatever is essential to the Right of the Plaintiff, and is necessarily within his own Knowledge, ought to be charged, positively and with Precision: it is not a sufficient Averment of a Fact in a

(a) 3 Atk. 750, 757.

(d) Red. Tr. Ch. 30.

(b) 1 Ves. j. 247. 4 Bro. C.
C. 38. 2 Eden. 230.

(e) 1 Ves. j. 287. 8 Ves.
398. 2 Ves. j. 327, 328.

(c) Red. Tr. Ch. 6. 18, 78.
Cowp. Pl. 21. 2 Madd. Chan.
164.

(f) Ord. Ch. Bea. Ed. 70,
166.

Bill to state that the Plaintiff is *so informed* (a): but the Claim of the Defendant may be stated in general Terms; and if a Matter essential to the Determination of the Plaintiff's Claims is charged to rest in the Knowledge of the Defendant, or must of necessity be within his Knowledge only, and is consequently the Subject of a Part of the Discovery sought by the Bill, a precise Allegation is not required. A Charge in a Bill that A was of a weak and feeble Understanding, approaching almost to Idiocy, was held to be an Allegation sufficiently precise, (no Demurrer being taken) to put in Issue, that A was of Insane Memory (b). Whatever is intended to be proved in the Cause, must be put in Issue by the Bill, otherwise the Complainant will not be allowed to give it in Evidence (c), for the Court pronounces the Decree *secundum allegata et probata*, that the Adverse Party may be apprized against what Suggestions he is to prepare his Defence; but a Charge in general Terms, where it is the Point on which the Merits of the Cause turns, and does not come in collaterally and incidentally, will warrant the Production of Evidence to particular Facts (d), if it should appear from the Statement of Facts in the Bill, where the Equity of the Case should be set out (e), that the Plaintiff of his own showing, has an effectual and complete Remedy in a Court of Common Law, or in any other Courts of ordinary Jurisdiction, competent to decide, it would be a Defect, of which the Defendant might avail himself by demurring (f), except in some Cases of Fraud, or Matters of Account, Dower, Partition, &c. and in the Case of Tithes, and the Disposition of the Effects of Persons dying Testate or Intestate, where Courts of Equity have assumed a concurrent Jurisdiction with the

(a) Red. Tr. Ch. 33. 1
Ves. 56.

(d) 2 Atk. 333, 337. Cowp.
Pl. 7. 2 Vern. 187.

(b) 2 Sch. and Lefr. 280,
305.

(e) 2 Anstr. 543.

(f) 2 Sch. and Lefr. 638.

(c) 1 Vern. 483. 1 Ves. j.
240. 11 Ves. 240. Cowp. Pl. 8.

Ecclesiastical Courts (a). It is the usual Practice to insert in the Bill a general Charge of Confederacy against the Persons complained of, but it seems unnecessary, nor can an Answer be compelled (b), unless specially charged (c), and is also improper, where a Peer is Defendant (d). And if the Plaintiffs are aware of a Defence which may be made, and have any Matter to alledge which may avoid it, the general Charge of Confederacy is usually followed by an Allegation, that the Defendants set up the Matter of their Defence, and by a Charge of the Matter which may be used to avoid it: this is commonly called the Charging Part of the Bill (e), and is sometimes also used for the Purpose of obtaining a Discovery of the Defendant's Case, or to put in Issue some Matter which is not for the Interest of the Plaintiffs to admit, for which Purpose, the Charge of Pretence of Defendant has been held sufficient (f). Thus if a Bill be filed, on any Equitable Ground by an Heir, who apprehends that his Ancestor has made a Will, he may state his Title as Heir; and alledging the Will by way of Pretence of Defendant's claiming under it, make it a Part of the Case without admitting it (g). The general Averment, though usually inserted, that the Complainant has no Remedy without the Assistance of the Court, is not necessary, nor is it true in every Instance (h); an Allegation that the Court has Jurisdiction will not do, unless supported by the Case shown in the Bill, from which it must be apparent that the Court has Jurisdiction (i). The Bill

(a) Red. Tr. Ch. 101, 110.
13 Ves. 278. 3 Wils. 73.

(b) 1 Anstr. 82.

(c) 1 Ves. 287. Dick. 489.

(d) Red. Tr. Ch. 33. 2
Madd. Ch. 169.

(e) Lord Kenyon, in the
Bills he drew when at the Bar,
never put in the Charging Part,
which does little more than un-

fold and enlarge the Statement.
11 Ves. 574. 2 Madd. Ch.
169.

(f) 3 Atk. 626.

(g) Red. Tr. Ch. 35, 36.

(h) 2 Cox Rep. 366. 5
Ves. 238. 2 Madd. Ch. 171.

(i) Red. Tr. Ch. 35. 1 Sch.
and Lefr. 204,

having shown the Title of the Persons complaining to Relief, and that the Court has the proper Jurisdiction, prays that the Defendant may Answer the Matters contained in the Bill, by admitting or denying all the Facts set forth, with all their attendant Circumstances, and to prevent Evasion by answering according to the Letter only, a Repetition by way of Interrogatory of the Matter most essential to be answered, adding to the Inquiry after each Fact, an Inquiry of the several attendant Circumstances, and the Variations to which it may be subject: this is termed the *Interrogating* Part, and must be founded upon the Matters contained in the former Part of the Bill, and is not to be considered as more extensive than the Propositions out of which the Interrogatories arise (*a*): if, therefore, there is nothing in the prior Part of the Bill to warrant an Interrogatory, the Defendant is not compellable to answer it; but a variety of Questions may be founded on a single Charge, if they are *relevant*: for instance, as to the Fact of Payment of Money; the Complainant may interrogate under a general Charge, as to all the Circumstances which go to prove, or disprove, the Truth of the Fact, as when; where, &c., without particular and specific Charges (*b*); so if a Bill is filed against an Executor for an Account of the Personal Estate of his Testator, upon the single Charge that he has proved the Will, may be founded every Inquiry which may be necessary to ascertain the Amount of the Estate, its Value, the Disposition made of it, the Situation of any Part remaining undisposed of, the Debts of the Testator, and any other Circumstances leading to the Account required; but the Complainant cannot, in strictness, interrogate to a distinct Subject as to which there is no Allegation in the Bill (*c*); he is confined to the Allegations: Depositions and Proof to Matters not charged, cannot be

(*a*) 6 Ves. 62, 63.

(*c*) 11 Ves. 273. 4 Br. C.

(*b*) 10 Ves. 290. 11 Ves. C. 458. 6 Ves. 62.

301. 2 Madd. Ch. 169.

read in Evidence ; but although the Rule is, not only to question in the Interrogating Part, and to make corresponding Charges in the Charging Part of the Bill, otherwise no Exceptions can be taken ; yet, if Defendant, though not obliged to Answer, has done so, and this Answer is replied to, the Fact is effectively put in Issue (a).

The Prayer of Relief demands very serious Consideration and Attention, and is to be varied according to the Case made by the Bill : an accurate Specification of the Matters to be decreed, and the proper Directions to be given in consequence, requires much Discernment and Experience. The Practice is to pray particular Relief, concluding with a general Prayer of that Relief which the Circumstances of the Case may require ; that if the Plaintiff mistakes the Relief to which he is entitled, the Court may yet afford him that Relief to which he has a Right ; it has been said that a Prayer of general Relief, without a special Prayer of the particular Relief to which the Plaintiff thinks himself entitled, is sufficient, and that the particular Relief may, at the Hearing, be prayed at the Bar, but this must be agreeable to the Case made by the Bill, and not different ; and the Court may not in all Cases permit a Bill framed for one Purpose to answer Another, especially if the Defendant may be surprized or prejudiced (b). A Bill seeking an Account of Fraudulent Dealings need not *specially pray* that every Bond and every Instrument taken without sufficient Consideration, should be set aside, the Prayer for *general Relief* has been held sufficient, consistent with the Case made by the Bill (c) ; and in some Cases of Fraud, where no other Relief can be given against a Party, deeply involved in the Fraud charged by the Bill, the Payment of

(a) 1 Ves. 538, 9.

(c) 2 Sch. and Lefr. 729.

(b) 2 Ves. j. 401. 5 Ves. Dom. Proc. 2 Atk. 141. 3
495. 13 Ves. 114. Red. Tr. Atk. 132, 325. 2 Ves. 225,
Ch. 31, 37. Cowp. Eq. Pl. 13. 229.
4 Madd. Rep. 408.

Costs of Suit ought to form Part of the Relief, for unless they are *so prayed*, the Court cannot make an Order upon the Party for Payment (*a*), and the Bill as to such Party would be open to a Demurrer; in like manner Interest has been refused, because not *prayed* by the Bill (*b*), but the Court may give the Complainant leave to amend his Prayer (*c*): Relief inconsistent with the specific Relief prayed, cannot be given under the Prayer for general Relief (*d*). Upon an Information by the Attorney-General on behalf of a Charity, the Court will give the proper Directions, without regarding the Propriety or Impropriety of the Prayer (*e*); and where a Bill is filed by an Infant, he may have a Decree upon any Matter arising upon the State of his Case, though he has not particularly insisted upon, and prayed it by his Bill (*f*); if the Plaintiff doubts his Title to the Relief he wishes to pray, the Bill may be framed with a double Aspect, that if the Court determines against him in one view of the Case, it may yet afford him Assistance in another (*g*). The Bill lastly prays that Process may Issue to enforce the Defendant's Appearance and Answer; and if any Defendant has Privilege of Peerage, or is a Lord of Parliament, (since the Union with Ireland, an Irish Peer, who is not a Member of the House of Commons, is entitled to Privilege of Peerage) (*h*), prays for a Letter missive before the Prayer of Process; where the Attorney-General, as an Officer of the Crown, is made

(*a*) 1 Anstr. 37. 15 Ves. 164. 2 Madd. Ch. 185. 1 Sch. and Lefr. 227. (*e*) 1 Atk. 355. 1 Ves. 43. 2 Ves. 426. 18 Ves. 319, 324.

(*b*) 1 Ves. 418. 2 Ham. Dig. 411.

(*f*) 1 Atk. 6.

(*g*) 2 Atk. 325. 6 Ves. 52.

(*c*) 12 Ves. 48. Cowp. Pl. 333. 2 Madd. Ch. 172.

(*h*) 8 Ves. 601. 1 Ves. and

(*d*) 3 Ves. 416. 2 Atk. 141, sed vid contr. 1 Cox, 58. Bea. 419. Stat. 39, 40. Geo. 3. c. 67.

a Defendant, the Bill, instead of praying Process, prays that he may Answer it, upon being attended with a Copy ; and to preserve Property pending a Suit, or to prevent the Evasion of Justice, immediately before the Prayer of Process, a Special Order and a Provisional Writ, either of Injunction, to stay Proceedings at Common Law, or Waste, or other injurious Act, or of *Ne Exeat Regno*, to restrain the Defendant from leaving the Kingdom, or other Writs of a similar Nature : and in aid of the Jurisdiction of an inferior Court of Equity, a Writ of *Certiorari*, to remove a former Suit there into the Court of Chancery : in this latter Case, no Process of Subpoena is prayed, and of course neither Appearance or Answer is required (*a*).

By the standing Orders of the Court (*b*), every Bill must be signed by Counsel ; and if in any Stage of the Suit, it should be discovered that the Bill is not signed, or that the Signature is counterfeit or disavowed, the Bill will, upon Motion, be ordered by the Court to be taken off the File, with Costs to be paid by the Plaintiff (*c*) ; an Information amended without the Sanction of the Attorney-General, has been ordered to be taken off the File (*d*) ; so if the Counsel's Signature be forged ; but not if an innocent Party is likely to suffer (*e*). And if the Bill contains *criminal, impertinent, or scandalous* Matter, it will, upon Application to the Court, be ordered to be expunged, and the Counsel ordered (*f*) to pay Costs to the Party aggrieved ; but it should be observed, that nothing *relevant* is considered

(*a*) Red. Tr. Ch. 8, 37, 40.
1 Madd. Chan. 182. 1 Ch.
Ca. 31.

(*b*) Ord. Can. Bea. Ed. 165.
2 Ves. and Bea. 358.

(*c*) 5 Ves. 547. Dick. 68.

(*d*) 1 Jac. and Walk. 254.

(*e*) 2 Anstr. 563. Bull v.
Griffin, in the Exchq. an At-

torney was committed for six months ; and the Court of K. B. struck an Attorney off the Roll for signing Pleadings in the Name of a Counsel without his authority or knowledge.

(*f*.) Ord. Cand. Bea. Ed.
167. Red. Tr. Ch. 39.

scandalous or impertinent (*a*). A Bill to set aside Deeds for Fraud, often contains gross Charges, but these are not deemed *scandalous*, for nothing pertinent to the Cause can be said to be scandalous, and the *maius* or *minus* of relevancy is not material (*b*). Allegations *material* to the Issue are not *impertinent*, though they may be false, and of whatever Nature, are not *scandalous* (*c*). A Bill cannot be referred for Impertinence after Answer, or Submission to Answer; but for Scandal at any Time (*d*), an Amended Bill, repeating all the Charges and Allegations in the original Bill, would be *impertinent quoad* such repetition (*e*); but not so, to state *part* of an Answer, by way of Pretence and to interrogate as to it (*f*). If a Bill contains Scandal on a *third Person*, not party to the Suit, it seems that an Action at Law will lie (*g*). And by a Defendant where the Court has no Jurisdiction over the Subject Matter of the Suit, but not for any Matter of which the Court has Jurisdiction, although it be *false*, because in a Court of Justice (*h*).

Suit on Behalf of Bodies Politic and Corporate, and of Persons who do not partake of the Prerogative of the Crown, and have no Claim to its particular Protection, are instituted by themselves either alone, or under the Protection of Others. Those who are incapable of exhibiting a Bill by themselves *alone*, are *Infants, Married Women, Idiots, and Lunatics* (*i*).

A *foreign Sovereign* may sue in the Municipal Courts of this Country, if the Subject Matter be properly cog-

(*a*) 2 Ves. 24. Mos. 45. 5 Ves. 656. Cowp. Pl. 19.
70. 1 Ves. 24.

(*b*) 11 Ves. 526. 2 Madd. Ch. 276. (*e*) 2 Ball and Beat. 225.
(*f*) 2 Madd. Rep. 176.

(*c*) 2 Ves. 631. 6 Ves. 514. (*g*) Cro. Eliz. 230.

11 Ves. 526. 15 Ves. 477. (*h*) 4 Co. 14. 4 Camp. 211.

(*d*) 2 P. Wms. 311, 313. (*i*) Rcd. Tr. Ch. 19.

nizable here (*a*) ; but a *foreign Government* not acknowledged, cannot (*b*). *Aliens* in amity with this Country, may sue in respect of a *personal* Demand (*c*), but not in respect of Land, or of a Demand partly real and partly personal (*d*). An *Alien Enemy* commorant here by the King's Licence, in time of War, has been allowed to maintain a Suit (*e*), but not if he resides abroad : he cannot even file a Bill for a Discovery merely (*f*). The Right of a Foreigner to sue upon a Contract generally, is only suspended by a subsequent War, and may be enforced upon a Restoration of Peace (*g*) ; but Persons disabled by Law to institute or maintain a Suit, may, notwithstanding, be made Defendants, and cannot plead their own Disabilities (*h*).

An *Infant*, from his Inability to bind himself, and to make himself liable to the Costs of Suit (*i*), is incapable *alone* of exhibiting a Bill ; any Person, therefore, *without his Consent*, may institute a Suit on his Behalf, and such Person is termed his *prochein Amy*, or *next Friend* ; he need not be a Relation ; he must, however, be a Man of Substance (*k*), because liable to the Costs of Suit, and to the Censure of the Court, if the Suit is improperly instituted ; but it should seem, that an Objection to his Ability to pay Costs must be taken, and the Application made to the Court, supported by an Affidavit, before Answer (*l*) ; for as the *prochein Amy* is named to be answerable for Costs, he cannot sue in *formâ pauperis* ; but he ought not to be discharged for Poverty (*m*). So where the *prochein Amy*

(*a*) 1 Ves. j. 371.

(*h*) 2 Coll. jurid. 140.

(*b*) 9 Ves. 347. 10 Ves. 353. 11 Ves. 283.

(*i*) Red. Tr. Ch. 20. Stra. 708.

(*c*) 1 Atk. 51.

(*k*) 1 Atk. 570. Red. Tr.

(*d*) Co. Litt. 129, 6.

Ch. 20, 22.

(*e*) 1 Ld. Raym. 282. 1 Atk. 42. 1 Bos. and Pul. 163.

(*l*) 1 Ves. j. 409. 1 Hen. Bl. 106.

(*f*) 2 Anstr. 462.

(*m*) 1 Ves. j. 409. P. Wms.

(*g*) 13 Ves. 71.

296.

cannot be found, the Defendant should apply in the first Instance, and before Answer (a). If by Collusion, Neglect, or Mistake, the next Friend does not lay the Case of the Infant properly before the Court, a new Bill may be filed (b), or the Cause may stand over at the Hearing to amend the Bill; or if the Suit be not fairly intended, but to satisfy a Purpose of Spleen, an Enquiry into the Fact will, upon Motion or Petition, be directed to be made by one of the Masters; and if he report the Suit to be *improper*, the Court will order the Bill to be dismissed with Costs, to be paid by the *procchein Amy* (c). And where an Infant's Bill was dismissed with Costs upon a Fact, which though not known when the Bill was filed, might with reasonable Diligence have been known, the *procchein Amy* was not allowed his Costs out of the Infant's Estate (d); but it should seem that no Degree of Mistake or Misapprehension, nothing short of a dishonest Intention, will be sufficient to charge a *procchein Amy* personally with Costs (e). Where the Master reported the Bill to be proper, and in the Result it was dismissed with Costs, the *procchein Amy* was, notwithstanding, allowed his Costs (f). If it be represented to the Court, that a Suit preferred in the Infant's Name is not for his Benefit, the Court will direct an Enquiry to be made in like manner; and if the Master reports that the Suit is not for the Benefit of the Infant, the Court will stay the Proceedings (g); but as the next Friend, in commencing a Suit, undertakes on his Part, that the Suit he has so commenced is for the Benefit of the Infant, it is not competent for *him* to apply for a Reference to determine the Point (h). And where two Suits for the same Purpose are instituted in the Name of an Infant, by different Persons as his next

(a) Mos. 47. 1 Ves. j. 410. and Bea. 59. 2 Ham. Dig.

(b) Red. Tr. Ch. 21. 471.

(c) 4 Madd. Rep. 461. 1 (f) 2 Ves. sen. 465. Dick.
Cox. Rep. 285. 168.

(d) 9 Ves. 548. (g) 3 P. Wms. 140.

(e) 1 Cox. Rep. 284. 3 Ves. (h) 2 Meri. 141.

Friend, the Court will direct an Inquiry to be made, which Suit is most for his Benefit, and when that Point is ascertained, will stay Proceedings in the other Suit (a). If it appears that the two Suits are not for the same Purpose, the Order of Reference will be discharged at the Costs of the Party applying (b), but if he be dissatisfied with the Master's Determination, he may take the Opinion of the Court, which he must do by stating his Objection, upon the Application to confirm the Master's Certificate, and not by filing Exceptions (c). If the *prochein Amy* of Infant Plaintiff die, and his Solicitor refuses to Name a new *prochein Amy*, the Defendant may obtain an Order upon Motion or Petition, that the Infant, upon Notice to his Clerk in Court, should procure a Person to be appointed his *prochein Amy*, or that Defendant should be at liberty to name a proper Person, or a Reference to a Master to appoint (d). The next Friend is so far interested, that he or his Wife cannot be a Witness in the Cause; if their Testimony should be required, the Bill must be amended by striking out the Name of such *prochein Amy*, and substituting another responsible Person, which may be done upon the usual Terms of Payment of Costs incurred up to that period (e). The *prochein Amy* of the Infant cannot *withdraw* himself, without a Reference to a Master to enquire whether it is for the Benefit of the Infant that another next Friend should be appointed in his Place, and the Master is usually at liberty to state any special Circumstances he may think proper (f). If the Infant when he attains Twenty-one, afterwards proceeds in the Cause, he will be liable to the whole Costs incurred (g); he may abandon the Suit when he comes of Age, but he cannot dismiss the Bill and compel the *prochein Amy* to pay the Costs, unless it be

(a) 1 Ves. 545. Ambl. 163.

(e) 12 Ves. 493. 3 Atk.

(b) 2 Meri. 43.

511.

(c) 1 Cox, 285.

(f) 4 Madd. Rep. 261.

(d) 1 Dick. 346. Ambl.

(g) Red, Tr. Ch. 21. Stran.

398. 3 Madd. 468.

708.

established that the Bill was improperly filed (a). A Bill has been allowed to be filed on Behalf of a Child *en ventre sa mere*, and an Injunction issued to restrain Waste (b). Infants defend a Suit by Guardians appointed by the Court, who are usually their nearest Relations, not concerned in point of Interest in the Matter in Question (c).

A *married Woman*, or *Feme Covert*, being under the Protection of her Husband, unless he is banished, or has abjured the Realm, or an Alien Enemy (d), for then she may act as a Feme Sole; a Suit respecting her Right is usually instituted by them jointly; if her Claims are in opposition to Rights claimed by her Husband, she being under the Disability of Coverture cannot sue *alone*, the Bill must be exhibited in her Name, by her *next Friend*, who is also named in the Bill, in like manner as in the Case of an Infant, but it cannot be filed *without her Consent* (e). Upon the Death of the Husband of a female Plaintiff suing in her Right, the Suit is abated, and she is not liable to the Costs, but if she takes any Step in the Suit afterwards, she makes herself liable to Costs from the beginning (f).

Idiots and *Lunatics* sue by the Committees of their Estates. Informations by the Attorney-General have been, in some instances, exhibited on their Behalf, when the Interests of the Committee have clashed with those of the Lunatic, or where, after the Lunacy, found no Committee has been appointed, and the Court has given directions for the Appointment of a Committee, and for the Care of the Property, but a *Relator* should be named (g); the Lunatic himself cannot be Relator (h), but it should seem that the Lunatic and his Committee may be Complainants (i); an

(a) 4 Madd. Rep. 461.

(b) Precd. Ch. 50.

(c) Red. Tr. Ch. 82.

(d) 2 Vern. 104. 3 P. Wms. 37. Salk. 116.

(e) Red. Tr. Ch. 22.

(f) Ibid. 47.

(g) Red. Tr. Ch. 23. 1 Ch. Ca. 112, 153. 2 Eden. 230.

(h) 1 Dick. 378. 2 Atk. 328.

(i) Eq. Ca. Abr. 378.

Order for the Appointment of a Guardian for a Lunatic to put in his Answer, has been made on the Application of the Plaintiff (a).

Persons incapable of acting for themselves, though not Idiots, Lunatics, or Infants, who by Age, or Infirmities, are reduced to a second Infancy, have been permitted to sue by their next Friend, without the Intervention of the Attorney-General, and to defend by Guardian (b).

Informations in every Respect follow the Nature of Bills, except in their Style (c), when they concern only the Right of the Crown, or of those whose Right the Crown takes under its particular Protection, as the Objects of a Public Charity; they are exhibited in the Name of the King's Attorney or Solicitor-General (d), as the Informant; and in the latter Case always, and in the former sometimes, a *Relator* is named, who, in reality, sustains and directs the Suit; if this Person has an Interest in the Matter, and sustains the Character of Plaintiff as well as Relator, the Pleading is stated an *Information and Bill* (e); he is Answerable for the Costs of the Suit (f), and if he is not a responsible Person, the Court will, upon Motion, stay the Proceedings till a proper Person is appointed (g). He cannot withdraw himself unless consented to by the Attorney-General, such Consent being necessary in every Stage of an Information filed in his Name (h). But in Cases where the Attorney-General can sustain the Suit, the joining a Person as Relator, who is not entitled to the equitable Relief he seeks, will not vitiate the Proceedings (i); and if the Relief given

(a) 5 Madd. Rep. 423.

(f) 1 Ves. 72. 2 Ves. 327.

(b) Red. Tr. Ch. 23, 82.
Pre. Ch. 229, 429. Eq. Ca.
Abr. 281.

1 Vern. 277, 370. 4 Dow. 8.

(g) 2 Eden. Rep. 230.

(h) 2 Madd. Ch. 165.

(c) Red. Tr. Ch. 19, 78.

(i) 1 Swanst. 305. 2 Madd.

(d) 4 Burr. 255.

Ch. 165.

(e) 4 Pro. C. C. 38.

by the Court be not such as prayed, Costs are not given (a); it should seem that the Relator need not be the Person principally interested, though if he has *some Interest*, he is a necessary Party (b); if there are several Relators, the Death of any of them, while there survives one, will not in any degree affect the Suit; if all die, or but one Relator, and he dies, the Court will stay Proceedings till an Order has been obtained to insert the Name of a new Relator, and such Name is inserted accordingly.

Suits at the joint Expence of the different Parties in a Suit pending, or of several Persons having a joint Interest in the Subject, are not directed by the Court on Motion and Affidavit, without a Reference to a Master to enquire, whether it is for the Benefit of the Parties, that a Suit should be instituted (c).

A Bill may be exhibited against all Bodies Politic and Corporate, and all Persons, as well Infants, married Women, Idiots and Lunatics, as those who are not under the same Disability, excepting the King and Queen; to a Bill against a married Woman, her Husband must be a Party, unless he is an Exile, or has abjured the Realm; and the Committee of the Estate of an Idiot or Lunatic must be made Defendant with the Person whose Property is under his Care (d).

Having endeavoured by the foregoing Observations to point out the Rules applicable to the framing and constituent Parts of Bills, it remains to consider the very important Subject of Parties to a Suit.

If on the Face of the Bill, a want of Parties appears, a Demurrer for want of proper Parties will lie (e); but if a sufficient Reason is suggested by the Bill, for not bringing a necessary Party before the Court; as where a personal Representative is a necessary Party, and the Representation

(a) 3 Anstr. 820.

(d) Red. Tr. Ch. 23.

(b) 2 Atk. 328. 1 Ves. j.
246.

(e) 1 Atk. 290. 3 P. Wms.
311, n. Red. Tr. Ch. 146.

(c) 3 Ves. and Beam. 167.

is charged to be in 'Litigation' (*a*), or where the Bill seeks a Discovery of the Parties interested in the Subject, and states that they are unknown to Plaintiff (*b*), a Demurrer will not hold (*c*). Where the want of Parties is not apparent on the Face of the Bill, the Defendant may *plead* the Matter necessary to shew it (*d*). A Plea of want of Parties goes both to Discovery and Relief, where Relief is prayed, though the Want of Parties is no Objection to a Bill for Discovery *merely* (*e*), nor where sufficient Reasons are suggested as before mentioned in the Case of a Demurrer, or the Party is resident out of the Jurisdiction (*f*), and so charged and a Discovery sought; an Objection for want of Parties will not lie, unless the Suggestions are controverted by Defendant: upon Argument instead of allowing the Plea, the Court usually gives leave to amend upon payment of Costs (*g*): Or an Objection for want of Parties may be taken at the Hearing of the Cause, but in the latter Case it is not the Course of Practice to dismiss the Bill (*h*), the Cause may be heard, or be ordered to stand over upon payment of Costs* of the Day (*i*), with Liberty to amend by adding Parties, or to file a Supplemental Bill merely to add Parties (*k*); even after a Decree and Appeal from the Rolls. But a Cause will not be put off at the Hearing for defect of Parties, unless by *consent*, or on some *special ground*; for instance that the Plaintiff was not aware of such Parties being in existence (*l*). It seems to have been laid down by *Lord Hardwicke*, as a general Rule, that when a Cause stands over for want of Parties, the Plaintiff pays the Costs of the

(*a*) 2 Atk. 51.

(*b*) 1 Vern. 95.

(*c*) Cowp. Pl. 185.

(*d*) Red. Tr. Ch. 226. 707. 4 Bro. C. C. 122.

1 Vern. 110. 2 Atk. 51.

(*e*) 2 Eq. Ca. Abr. 170.

(*f*) Pre. Ch. 83. 2 Atk. 510.

(*g*) 1 P. Wms. 428.

(*h*) 3 Atk. 310.

(*i*) 2 Atk. 14. 1 Dick. 96,

4 Bro. C. C. 122.

(*k*) 1 Dick. 799.

(*l*) 16 Ves. 356.

* In Court 5*l*, at the Rolls 3*l*. 6*s*. 8*d*., settled by Lord Maclesfield.

Day, but this Rule admits of certain Qualifications founded on the unnecessary Delay and Expence occasioned by a Defendant's *Mode of Defence*. Where a Bill was open to a Demurrer, and the Defendant had laid by, and did not avail himself of that Defect, and the Cause came on, and the Bill was dismissed, it was held that the Defendant's Conduct did not entitle him to Costs (a). And in a recent Instance, a Defendant did not state in his Answer, the Want of Parties, but suffered the Cause to come on to be heard, and then took an Objection for want of Parties, and the Cause stood over, but the Court refused to allow him the Costs of the Day, his Answer not stating the Objection (b). But it should seem that if a Plaintiff, on the Hearing, waives the Relief he prays against a Party, it answers the Objection to making such Person a Party (c); sometimes by waiving a particular Claim, a Plaintiff may avoid the Necessity of making Persons who may be affected by it Parties, though such Claim might be an evident Consequence of the Rights asserted by the Bill against other Parties; this, however, cannot be done to the Prejudice of Others. So if the Plaintiff agrees to dismiss his Bill as against a Person unnecessarily made a Party, it does away the Objection; and the Cause has been allowed to proceed against the other Defendants (d), or if he has dismissed the Bill as against such Defendant before the Cause is heard (e), but the merely naming a Party in a Bill as a Defendant does not make him so; those only are considered as Parties against whom Process is prayed (f).

All Persons materially interested in the Subject, ought generally to be Parties to the Suit, Plaintiffs or Defendants, however numerous they may be, so that the Court may be enabled to do complete Justice, by deciding upon and settling the Right of all Persons interested, and to pre-

(a) Anon. 3 Madd. Rep. 62, n.

(b) Ibid, 61.

(c) 2 Atk. 295.

(d) 3 Atk. 400.

(e) 4 Price's Rep. 266.

(f) Dick. 707.

vent future Litigation; but this being a general Rule admits of many Qualifications and Exceptions (*a*).

Trustees of Estates of Inheritance, or the Survivors or Survivor, or his *Heir*, and the Survivors or Survivor, or his *personal Representative* of a Term or other Chattle Interest, must be Parties to a Suit, respecting the Subject Matter of such Trust (*b*): and if a Trustee has assigned his Trust, the Assignee must be made a Party, the Decree must be first against him, and the original Trustee to stand as a Security (*c*); though the Deeds creating the Trust are void, yet the Trustee must be a Party to a Suit to have the Deeds delivered up (*d*). But a Trustee in a Will, who has released and never acted, ought not to be a Party in a Suit to set aside the Will on the ground of Fraud (*e*). A Trustee may in some Cases file a Bill in his own Name only (*f*); as where one Trustee seeks Relief against a co-Trustee, for a Breach of Trust (*g*), the *Cestui que Trust* is not a necessary Party; but ordinarily, the *Cestui que Trust*, where the Bill is for an Execution of the Trust, is made a Party (*h*). If the Trustees of a Term and the *Cestui que Trust* are before the Court, an *intermediate Trustee* of the *equitable* Interest need not be made a Party to a Bill filed to carry the Trusts of the Term into execution (*i*). To a Bill filed by a *Cestui que Trust*, the Trustee is not necessarily a Party (*k*), but in general he is made a Party (*l*). Trustees, parties to a Suit, will not be allowed to change the Trustees, under a Power for that Purpose, without the Authority

(*a*) Red. Tr. Ch. 133. 7
Ves. 563. 2 Atk. 1. Meri.
262. 2 Madd. Ch. 179.
Cowp. Pl. 34.

(*b*) 1 Eq. Ca. Ab. 72.

(*c*) 2 Br. C. C. 225. 2
Hamm. Dig. 407.

(*d*) 7 Ves. 3. Cowp. 18.

(*e*) 1 Anstr. 65. 5 Madd. 435.

(*f*) Toth. 285. 2 Atk. 48.

(*g*) 3 Ves. 75.

(*h*) 1 Vern. 110. Prec. Ch.
275. 1 Ball and Bea. 104.

(*i*) 1 Cox Rep. 57.

(*k*) Prec. Ch. 275.

(*l*) 1 Eq. Ca. Abr. 72. 2
Bro. C. C. 225. 7 Ves. 3.

of the Court; and the Court will, upon Motion, restrain them (a). Trustees of a real Estate for Payment of Debts or Legacies, may sustain a Suit, either as Plaintiffs or Defendants, without bringing before the Court the Creditors or Legatees for whom they are Trustees; and the Right of the Creditors or Legatees will be bound by the Decision of the Court against the Trustees (b).

To a Suit for the Execution of a Trust, by or against those claiming the ultimate Benefit, after the Satisfaction of prior Charges, the Persons claiming the Benefit of such prior Charges, are not necessary Parties: Creditors, Legatees, or other prior Incumbrancers, are not necessary Parties to a Bill for Application of the Surplus paid after Payment of Debts, Legacies, or other Incumbrances. Persons interested under the Trust, if the Disposition of the Property is *absolutely* vested in the Trustees, need not be Parties to a Suit by Persons having Demands against the Trustees prior to the Creation of such Trust: if *not absolutely vested*, the Persons claiming the Benefit must be Parties. Persons having specific Charges on the Trust-Property, are frequently necessary Parties; but this will not extend to a general Trust for Creditors or Others, whose Demands are not distinctly specified in the Creation of the Trust.

Analogous to Trustees are *Executors and Administrators* in a Suit for carrying into Execution the Trusts of a Will. An Executor before Probate, may file a Bill, and it is sufficient if he take out Probate before the Hearing (c). In a Suit for an Account of personal Estate, though the Person who has the Right to administer be a Party, Administration must be actually taken out (d). An *Executor* outlawed, and not to be found and so proved, need not be made a Party (e); but if an Executor, after proving the Will, leaves the Kingdom, or goes out of the Jurisdiction, and an Administrator be

(a) 7 Ves. 487.

(b) Red. Tr. Ch. 142

(c) 3 P. Wms. 352.

(d) 3 P. Wms. 349.

(e) 1 P. Wms. 684.

appointed under *Stat. 38 Geo. 3. c. 87.* upon return of the Executor *pendente lite*, he must be made a Party, and the Administrator paid his Costs and discharged (*a*). Where, of four Executors, one only proved, and died, and the Others renounced, it was held the Executors of him who proved, and also the Other surviving Executors of the original Testator must be made Parties (*b*). Where Tenant in Fee mortgages by creating a Term, an Executor is not a necessary Party to a Bill of Foreclosure, nor is it necessary to make the Executor Party in a Suit to foreclose the Heir of the Mortgagor (*c*); but where the Heir of the Mortgagee brings a Bill to foreclose, or the Heir of Mortgagor files his Bill to redeem, the personal Representative must be made a Party (*d*). An Executor *durante minori ætate*, if the Estate is not collected in, must be brought before the Court (*e*). An Administrator, though insolvent, must be made a Party to a Bill for Discovery of *personal*, but not of *real* Assets in a Suit by an Heir to preserve a Debt, where the Representation is suggested by the Bill to be in contest (*f*). For the Discovery of Assets descended, in a Suit by a specialty Creditor, the *personal Representative*, and also the *Heir*, must be Parties (*g*). In a Suit by the Assignee of a Bond, the *personal Representative* of the original Obligor must be a Party (*h*); the *personal Representative* is the only necessary Party in a Suit by Creditors of a Testator or Intestate (*i*). In a Suit against the *Executor* of a deceased Obligor, upon a joint and several Bond, it is not necessary to make the surviving Obligor a Party (*k*).

(*a*) 7 Ves. 460.

(*b*) 1 Cox Rep. 426.

(*c*) 3 P. Wms. 333, n. 2
Bro. C. C. 279. 13 Ves. 234.

(*d*) 2 Vern. 66. 2 Eq. Ca.
Abr. 77. 2 Freem. 52.

(*e*) 2 Atk. 121.

(*f*) 2 Atk. 51. 3 Atk. 341.

(*g*) 1 P. Wms. 331. Kenyon

Rep. 133. 2 Atk. 125.

(*h*) 3 Bro. C. C. 25. 1 Ves.
j. 464.

(*i*) 2 Atk. 33. 1 Ves. j.
105. 4 Ves. 665. 6 Ves. 748.

(*k*) 2 P. Wms. 313,

Husband and Wife are so united in Interest, that the Husband must be a formal Party to a Bill filed against the Wife, in respect of her separate Property, unless he is an Exile, or has abjured the Realm (*a*); where a Legacy is given to the Wife, the Husband is not allowed to sue alone, she has a Claim to a Settlement (*b*); if a Husband sues for *Choses in Action*, belonging to the Wife, as a Bond, &c., the Wife must join; where a Husband, under a Marriage Settlement of Lands, limited to the Wife for Life, filed his Bill, to ascertain the Lands settled; at the Hearing, the Court took the Objection, that the Wife not being a Party, she would not be bound by the Decree (*c*); but a Wife may Sue alone for a separate Maintenance, without the Husband (*d*): a Wife cannot be made a Party as Agent to her Husband, to a Bill seeking to charge him, through her Agency (*e*).

The Committee of an *Idiot or Lunatic*, must be made a Defendant with the Person who is under his Care (*f*).

One Joint-tenant cannot be made a Defendant without the Other (*g*).

If A. having outlawed B., files a Bill against B. and C., a Trustee for B. with respect to an Annuity, to subject the same to the Plaintiff's Debt, the Attorney-General ought to be made a Party, and the Plaintiff must get a Lease or Grant in the Exchequer from the Crown (*h*).

Two Plaintiffs cannot join in one Bill, where their Interests are several; nor can a Plaintiff demand, by one Bill, several Matters, of different Natures, against several Defendants (*i*); but where a Person claims a General Right to the sole Fishery of a River, he may file his Bill

(*a*) 1 Ves. j. 278. Red. Tr. Ch. 24.

(*f*) Red. Tr. Ch. 24. 1 Ch. Ca. 19.

(*b*) 1 Ch. Ca. 41. Nels. Rep. 78. 5 T. R. 690.

(*g*) Finch. 82.

(*c*) 1 Atk. 209. 1 Ch. Ca. 41.

(*h*) 1 P. Wms. 445. 2 P. Wms. 269. Parker's Rep. 368.

(*d*) 1 Ch. Ca. 35. 5 Madd. 414.

(*i*) Red. Tr. Ch. 147. Hard. 337. 1 Vern. 29.

(*e*) 5 Ves. 322.

against several Persons claiming several Rights in the Fishery (*a*) ; and for avoiding Multiplicity of Suits, and to bring all Parties before the Court, the Suit is by or against divers Parties who have separate Rights or Interests, as Devisees, Creditors, and the like (*b*). A Bill is not multifarious, because different Persons, having distinct Interests, are joined, if the Object of the Suit is single : it is only so when it seeks Relief in respect of Matters in their Nature separate and distinct (*c*).

In the Case of *Mortgages*, a Bill to redeem a Mortgage in Fee, must make the Executor of the Mortgagee a Party, as well as the Heir at Law (*d*) ; but if Tenant in Fee mortgages by creating a Term, the personal Representative ought not to be a Party to a Bill of Foreclosure (*e*). In a Suit by an under-Mortgagee to foreclose the original Mortgagor, the first Mortgagee must be made a Party, because the first Mortgagee has a Right to redeem the second (*f*). A second Mortgagee, though of Part only of the Estate comprised in the first Mortgage, and under a different Title, filing his Bill to redeem, must make the Mortgagor or his *Heir*, and not the personal Representative, a Party (*g*) : but the Heir is not a necessary Party to a Bill by a Devisee to redeem, unless he wishes to have the will established (*h*). In Suits for Redemption, the Person having the legal Estate, must be before the Court for the Purpose of a Re-conveyance (*i*). In a Bill to foreclose the Heir of the Mortgagor, it is not necessary to make the personal Representative a Party ; for though the Heir is entitled to have the personal Estate applied in exoneration of the real, he must enforce that Right by Suit (*k*), and all Persons claim-

(*a*) 1 Atk. 148.

(*b*) 2 Madd. Ch. 177.

(*c*) 5 Madd. Rep. 122, 138.

(*d*) 2 Freem. Rep. 52. 3

P. Wms. 331.

(*e*) 13 Ves. 234. 3 P.

Wms. 333.

(*f*) 3 P. Wms. 643.

(*g*) 12 Ves. 48, 59. 2 Bro.

C. C. 276. 2 Freem. 52.

(*h*) 2 Ves. 434.

(*i*) 2 Madd. Ch. 191.

(*k*) Rep. Temp. Hard. 109.

3 P. Wms. 334.

ing under a Mortgage, are generally made Parties in a Suit for Redemption (*a*). Where a Mortgagee in Fee has executed a Conveyance, with several Remainders over, the first Tenant in Tail is a necessary Party (*b*). In a Suit by Heir of Mortgagee to foreclose, both Heir and Executor of Mortgagor must be Parties (*c*). An under Mortgagee filing his Bill to foreclose, the original Mortgagee must be a Party (*d*). Where there have been several mesne Assignments of a Mortgage, the last Assignee is the only necessary Party, unless the Mortgagor has been a Party to the Assignments (*e*). It should seem, though not decided, and generally the Practice, to make *all Incumbrances, previous* to filing a Bill to foreclose, Parties; and a Cause has stood over, to make a judgment Creditor a Party (*f*); but it seems, now, to be well established, that Incumbrances, *after* a Bill filed, are not *necessary* Parties (*g*).

In most Cases, the Person having the legal Estate in the Subject, must be a Party, though he has no beneficial Interest, that the legal Estate may be bound by the Decree: thus if a Bond, or a Judgment be assigned, the Assignor as well as the Assignee, must be a Party, for the legal Right of Action remains in the Assignor (*h*); where a Bill is filed by the Assignee of a Judgment, the Assignor is a necessary Party (*i*). Where a Bill is filed for Equitable Relief as to a *Rent-charge*, all the Parties, whose Estates are liable, must be brought before the Court, unless impracticable, or highly inconvenient (*k*); but not if the Rent-charge be claimed by a Charity (*l*).

Where *real Property* in question, is subject to an En-

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| (<i>a</i>) 3 Madd. Rép. 255. | 11 Ves. 195. 1 Bell and Bca. |
| (<i>b</i>) 2 Atk. 237, 8. | 167. 187. |
| (<i>c</i>) 2 Eq. Ca. Abr. 77. 2 Vern. 66. | (<i>h</i>) Red. Tr. Ch. 145. |
| (<i>d</i>) 2 P. Wms. 642. | (<i>i</i>) 1 Ves. j. 463. |
| (<i>e</i>) 2 Atk. 39. 9 Ves. 268. | (<i>k</i>) 11 Ves. 367, 429. |
| (<i>f</i>) 3 Ves. 314. | (<i>l</i>) 1 P. Wms. 599. 11 Ves. 365. |
| (<i>g</i>) 2 Atk. 174. Amb. 676. | |

tail, it is generally sufficient to bring before the Court the *first Tenant* in Tail in being, and if no Tenant in Tail in being, the first Person entitled to the *Inheritance* (a), with those claiming prior Interests, omitting Remainder-men and Reversioners, after such vested Estates of Inheritance; and a Decree against the vested Estate of Inheritance will bind the Remainder or Reversion, though vesting in Possession after Failure of the previous Estates (b); but *Persons interested*, though not *Parties*, may avail themselves of Opportunities in the Progress of the Suit, to support their Interests (c). And a Remainder-man, becoming afterwards entitled in Possession, may Appeal, from a Decree, against the prior Estate of Inheritance, though he cannot avoid the Decree by a new Bill (d).

A Decree against a Person Claiming a vested Estate of Inheritance, will bind contingent Limitations and executory Devises to Persons not in being; but to a Bill affecting the Right of a Person in being, claiming under a Limitation, by way of executory Devise, not subject to any preceding vested Estate of Inheritance, by which it may be defeated, such Person must be made a Party (e).

Where a Person born, pending the Suit, becomes entitled to an Interest prior in Limitation to any Estate of Inheritance before the Court, he must be made a Party by Supplemental Bill; so if a new Interest is acquired, by the Determination of any Contingency, not subject to Destruction by a prior vested Estate of Inheritance, the Person having that Interest must be Party. And so by the Death of the Person, having the Personal Estate of Inheritance, when the Suit began; the Person entitled to the next Estate of Inheritance, and all Persons having prior Interests must be made Parties. (f)

(a) 2 Vern. 527: 1 Sch.

and Lefr. 408. 5 Ves. 10. 9

Ves. 58. Ambl. 564. Diok. 411.

427. 16 Ves. 327.

(b) Red. Tr. Ch. 141.

(c) 16 Ves. 327.

(d) 1 Sch. and Lefr. 386,

(e) Red. Tr. Ch. 141.

(f) Red. Tr. Ch. 141.

The *Heir at Law*, is often made a Party to a Suit: as for instance, to a Bill for carrying into Execution the Trusts of a Will disposing of real Estate, by Sale or Charge, the *Heir at Law* of the Testator is a necessary Party, that the Title may be quieted against him, and the Will established: where there has been a prior Will, disposing of the same Property differently, revoked only by a subsequent Will, the Persons claiming under the prior, are not necessary Parties, though they may disturb the Title as well as the Heir; if, however, the prior Will is set up as a valid Instrument, in opposition to the subsequent Will, the Persons claiming under it, may be brought before the Court, to quiet the Title, and to protect those, acting under the latter Instrument (*a*). If no Heir can be found, the Attorney-General is usually made a Party to a Bill for carrying the Trusts of a real Estate into execution; if the Escheat be to the Crown, and the Will should be subject to impeachment, any Person claiming the Escheat against the Crown, would be a necessary Party: if the Heir should be out of the Jurisdiction of the Court, and so charged and proved, upon full Proof of the legal Execution of the Will and Sanity of the Testator, the Court will proceed, though such Evidence cannot be used against the Heir in disputing the Will, nor can it be established against the Heir, or the Title under it ensured against his Claim.

Where a Devisee is sued for Satisfaction of a Debt by Covenant or Bond, binding the Heir under *Stat. 3 and 4, W. & M. c. 14*, to charge the real Assets come to the Hands of the Devisee, the Heir at Law must always be made a Party (*b*); and if any Assets have descended to the Heir, they are first applicable, unless the Assets devised are charged with Debts in exoneration of the Heir. The personal Representative of the deceased Debtor, is also

(*a*) Red. Tr. Ch. 140.

125. Red. Tr. Ch. 143. Cowp.

(*b*) 1 P. Wms. 100. 2 Atk. Pl. 38.

generally a necessary Party (*a*), for the Purpose of applying the personal in exoneration of the real Assets; if there has been no general, there must be a special Administration, limited to the Subject of the Suit: as the limited Administrator can collect no general personal Assets, and the Person entitled to general Administration must be previously cited, it is presumed, there are no such Assets to be collected, or a general Administration would have been obtained, and the personal Representative must be a Representative constituted in England (*b*).

Where no general Administration has been taken out by a personal Representative, entitled to and claiming property in dispute, a limited Administration will be necessary, to enable the Court to proceed on such Claim; and when a vested Right, as for instance, a Trust-term, is to be assigned, an Administration limited to the Trust-term must be taken out, to warrant the Court to assign the Term; sometimes, when it appears that the personal Representative (not a Party in the Cause) ought to be privy to the Proceedings, though his Rights may not be in question at the Hearing, the Court has given Directions for proceeding, without making such Representative a Party, by amending or otherwise; and the Parties in the Cause have been at liberty to bring a Representative before the Master on Proceedings which may affect such Representative; and in the subsequent Proceedings he is considered as a Party in the Cause.

Persons claiming, as occupying Tenants, under the Possession of a Party whose *Title is disputed*, are not necessary Parties; though if such Title was merely equitable, they might be affected by an adverse Decision; but not if it was a legal Title only; for their Rights would not be prejudiced by a Decree, in their Absence: upon a Suggestion of their Rights, the Decree is always without Prejudice, or in some other shape qualified: if the Decree is to be conclusive, the

(*a*) 3 P. Wms. 331.

(*b*) 1 Vern. 397.

Persons claiming such Rights, must be made Parties: a Mortgagee claiming, is usually made a Party.

The Expression, that all Parties interested in a Suit must be made Parties, admits of many Qualifications and Exceptions, introduced from necessity, or with a View to practical Convenience.

Where a Bill seeks a *Discovery of the necessary Parties*, (a) or when a Person, who ought to be a Party, is out of the *Jurisdiction* of the Court, that Fact being stated in the Bill, and admitted by the Defendant, or proved at the Hearing, is usually a sufficient Reason for not bringing him before the Court; and though the Court cannot compel him to do any Act, it can proceed against the other Parties; and if the Disposition of the Property is in the Power of such other Parties, the Court may act upon it (b). It seems, however, advisable to add the Name of such absent Person, as a Party to the Bill, so far as it may be necessary to connect his Case with that of the other Parties; and if, in fact, he should become amenable pending the Suit, he ought to be brought before the Court, by issuing Process, if Process has been prayed, or by amending the Bill, if the State of the Proceedings will admit of such Amendment, or if not, by filing a Supplemental Bill. If the absent Party is required to be active in the Performance of the Decree, as if a Conveyance by him be necessary, or the Foreclosure of a Mortgage against the original Mortgagor, his Representatives, or Assigns under a Decree; the Court cannot proceed to a Determination against the absent Party. A foreign Corporation, not amenable to the Jurisdiction, falls within this Description; a Corporation in Scotland has been so considered (c).

Where the Suit is on behalf of many in the same In-

(a) 1 Vern. 95.

(c) Red. Tr. Ch. 135. 2

(b) 1 Sch. and Lefr. 240. Madd. Ch. 179.

2 Bro. C. C. 399. sed. vid. 2

Bro C. C. 277.

terest, and all the Persons answering that Description, cannot easily be discovered, or ascertained: and where the Persons interested are very numerous (*a*), as in the Case of the *Water-works Company* (*b*), the *New River Company* (*c*), *Drury-Lane*, and other *Theatres* (*d*), one of many entitled to Prize-Money (*e*), and others of the Kind (*f*). A few have been permitted to sue on behalf of great Numbers having the same Interest (*g*).

But in a Suit instituted by *some Members* of a Society for Relief in Sicknes, &c. by means of a Fund raised by Subscription of the Members for an Account against the Trustees, it was held that *all the Members* must be Parties, being considered merely as a *Partnership*, having no *corporate Capacity* (*h*).

A few Creditors may institute a Suit on behalf of themselves and other Creditors of the deceased Debtor, for an Account and Application of his real and personal Assets in payment of their Demands (*i*), and the other Creditors may come in under the Decree, and obtain their Demands equally with the Plaintiffs; and if they decline or refuse, will be excluded the Benefit of the Decree, and bound by Acts done under it: as a single Creditor may sue, it is considered as a Matter of convenience to permit such a Suit; for if a Bill be brought by a single Creditor for his own Debt, he may as in a Court of Law, gain a Preference over other Creditors in the same Degree, who have not used equal diligence, and some of a Number of Creditors, parties to a Trust-Deed for Payment of Debts, have been permitted to sue on behalf of themselves and the other Creditors named

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| (<i>a</i>) Pre. Ch. 592. | 2 Ves. 312. 1 Bro. C. C. 101. |
| (<i>b</i>) 2 Vern. 420. | 4 Ves. 627. 6 Ves. 773. 13 |
| (<i>c</i>) 11 Ves. 429. | Ves. 542. |
| (<i>d</i>) 2 Bro. C. C. 338. | (<i>h</i>) 3 Ves. and Beam. 182. |
| (<i>e</i>) 13 Ves. 397. | 6 Ves. 773. |
| (<i>f</i>) 16 Ves. 921. 17 Ves. 1. | (<i>i</i>) 2 Ves. 312. 3 Atk. 571. |
| 6 Ves. 779. | Red. Tr. Ch. 136. |
| (<i>g</i>) Gilb. 230. 1 Atk. 284. | |

in the Deed for execution of the Trust (a), although one of those Creditors could not have sued, without bringing the other Creditors before the Court. Creditors of a Testator or Intestate, need not, or rather cannot (b), make anybody, but the personal Representative a Party : but in case of Insolvency, or where there are any Persons who have possessed the Estate, or any Debtors of the Deceased who deny they have any such Assets, or apply them improperly (c) ; or where there is any Collusion between them and the Representative, they may follow the Assets, and make them Parties, and demand an Account (d). To a Bill by a specialty Creditor, for discovery of Assets descended, both heir and personal Representative must be Parties (e). In a Suit by a Bond Creditor against a Devisee of the Creditor's real Estate (f), or against an Assignee of the Devisee, the Devisor's Heir must be a Party (g). The personal Representative of the deceased Debtor, is also, in general, so considered, for the Purpose of applying the personal Estate, in exoneration of the real Assets (h). If a Bill be filed by the Assignee of a Bond, the Representative of the original Obligee must be made a Party (i). It may not be improper in this Place to observe, that by a Rule in Equity, *where Two or more are liable to a Demand, One alone cannot be proceeded against, but that all the Parties liable must be brought before the Court (k)* ; because the Debtors are entitled to the Assistance of each other in taking the Account and where one pays more than his Share of the Debt, the Debtors are entitled to Contribution (l) ; and another Reason is, that if there are different Funds ; as where the Debt is by specialty, and

(a) Red. Tr. Ch. 136.

(g) 2 Atk. 125.

(b) 6 Ves. 748. 3 Ridg. P. C. 18.

(h) 3 P. Wms. 330.

(c) 2 Atk. 33.

j. 464.

(d) 1 Ves. 105. 4 Ves. 665.

(k) 2 Vern. 95.

(e) 3 P. Wms. 331. 3 Atk. 406. Lord Kenyon's Rep. 133.

(l) 3 Atk. 406. 2 Freem.

(f) 1 P. Wms. 99.

the Plaintiff might, at Law, sue either the Heir or Executor for Satisfaction, he must make both Parties, that he may in the last Place come in upon the real Assets (a); but it should seem that if some of the Obligors are only *Sureties*, the Principal in the Bond cannot object, that the Creditor has not brought the Surety before the Court, unless he had paid the Debt: and if it plainly appears that there are no Assets, the Representative of that co-Obligor is not a necessary Party. In a Suit upon a joint and several Bond, where a Surety had not been made a Party, the Court held that all ought to be Parties, to prevent Circuity; but that if the Bill states, and Defendant admits, the co-Obligor to be Insolvent, the Objection is removed (b). Lord Eldon more recently has decided, that if a Plaintiff sues upon a joint and several Bond, all the Obligors, Principals, and Sureties, must be before the Court; but that where it appears that the Sureties are Insolvent, and have paid nothing, the Rule is dispensed with, and the Demand is accordingly restrained, as a Demand against the Principal who has nothing to demand over (c). By analogy to the Case of Creditors, a *Legatee* is permitted to sue on behalf of himself and other Legatees; as he might sue for his own Legacy only, a Suit on behalf of all the Legatees has the same Tendency as a Suit by one Creditor on behalf of all other Creditors: but in a Suit by one Legatee for his own Legacy, unless the personal Representative by admitting Assets, warrants an immediate personal Decree against himself, by which he alone would be bound, the Court will direct a general Account of all the Legacies, and payment of the Legacy claimed, *rateably only* with the other Legacies: no preference being allowed amongst Legatees. And after a Decree for an Account, the Court will restrain subsequent Proceedings by a separate Creditor or Legatee at Law or in Equity. To a Bill by a Legatee against an Executor, a residuary

(a) 2 Atk. 436. Kenyon's
Rep. 133.

(b) 2 Dick. 738.

(c) 16 Ves. 326

Legatee need not be a Party (*a*); nor in such Case are other Legatees out of personal Estate only, necessary Parties; but where a Legatee out of real Estate files a Bill, every Legatee whose Legacy is charged on such real Estate, ought to be before the Court (*b*). In some Cases the Court has regretted that residuary Legatees were not Parties to a Bill by a Legatee where Points have arisen in which they were materially interested: a residuary Legatee filing a Bill, must in general bring before the Court, all Persons interested in the Residue (*c*). One Legatee may sue alone (*d*), and the other Legatees may come in under the Decree; but where the Residue of the personal Estate was devised to three, it has been held that one could not sue for his Share without joining the others as Parties to the Suit (*e*).

For the Application of personal Estate *amongst next of kin*, or Persons claiming under a general Description, as the Relations of a Testator or other Person, where it may be uncertain who are all the Persons answering that Description, a Bill has been admitted by one Claimant on behalf of himself and the other Persons equally entitled (*f*). The Interests of *Persons not Parties* to a Suit, may be in some Degree affected, and yet the Suit has been permitted to proceed without them; as a Bill by a Lord of a Manor against *some* of the Tenants, or by *some* of the Tenants against the Lord on a Question of Common; so by a Parson for Tithes against *some* of the Parishioners, or by *some* of the Parishioners against the Parson to establish a general Modus. It should seem that where a Bill is brought to establish a general Modus through a whole Parish, all the Land Owners must be either Plaintiffs or Defendants; but if the Plaintiff sues for Tithes in Kind, the Defendant may insist on such Modus, though the rest of the Parishioners are not Par-

(*a*) 1 Madd. Rep. 446.

1 Bro. C. C. 303.

(*b*) 1 Cox Rep. 332.

(*c*) 2 Ch. Ca. 124.

VOL. I.

(*d*) Ibid. Nels. Ch. Rep. 243.

(*e*) 3 Bro. C. C. 365, 229.

(*f*) Red. Tr. Ch. 138.

ties (a); though a Modus be laid on all the Occupiers, yet each is liable for the Whole, so that suing a Part of the Occupiers is sufficient (b). If a Rector's, or an Impropricator's Right does not come in question, he need not be made a Party for subtraction of Tithes (c). On a Bill to establish a customary Payment in lieu of Tithes, the Ordinary must be a Party (d). Persons who may be *consequently interested*, form also an exception to the Rule, *that all Persons interested in the Subject must be Parties: to a Suit by a single Creditor, for satisfaction of his single Demand out of the Assets, though every other unsatisfied Creditor may be consequentially affected by the Suit, that Interest is not such as to require the other Creditors to be made Parties, though the Decree will compel them to admit the Demand, taken and ascertained under its Authority; but the Account so taken will not bind them. And in Suits by Creditors and Legatees, the Persons entitled to the personal Assets, after payment of Debts or Legacies, are not necessary Parties, though interested to contest the Debts and Legacies, and bound to allow the Demands admitted in those Suits, though not bound by any Account taken in their absence.*

It is a Rule, that *no one need be made a Party, against whom, if brought to a Hearing, the Plaintiff can have no Decree (e):* a residuary Legatee, for instance, need not be made a Party to a Bill by a Legatee against an Executor (f). A Bankrupt is not a necessary Party to a Suit brought against the Assignees of his Estate (g), though for some purposes of Discovery perhaps he might (h). So for a

(a) 2 Eq. Ca. Abr. 170. seq.
vid. 1 Atk. 283.

(b) 3 Atk. 247.

(c) 3 Atk. 500.

(d) 11 Ves. 509.

(e) 3 P. Wms. 310, n.
2 Madd. Ch. 184.

(f) 1 Madd. Rep. 446.
1 Bro. C. C. 303.

(g) 3 P. Wms. 311, n. I.

(h) 2 Vern. 32. Red. Tr.
Ch. 131, contr. 1 Ves. and
Beam. 550. 2 Anstr. 478.

Discovery from a Corporation aggregate, the Clerk is usually made a Party (a).

Persons ought not to be made Parties, who may be examined as Witnesses, and against whom no Relief is prayed; such unnecessary Parties may demur or plead, as the Case may be (b). Agents to Corporations (c), Arbitrators (d), and Attornies who have fraudulently prepared Deeds sought to be set aside, and other Persons concerned in obtaining them, are excepted Cases (e); for it should seem, that where an Attorney, or any other Agent, has so involved himself in the Fraud charged by the Bill, that although a Re-conveyance, or other Relief, cannot be prayed against him, a Court of Equity, rather than that the Plaintiff shall not have his Costs, will order the Attorney or Agent to pay them. By a late Decision of *Lord Eldon, C.* “to make an Attorney pay Costs, as having mixed himself in a Case of Fraud, you must not merely make him a Party to the Bill, but must also pray that Relief against him; or if it is looked into, it will be found that a Demurrer will lie (f); but it does not seem necessary to make an Attorney a Party, merely because he has Title Deeds in his Hands, though there may be Cases in which it may be necessary to make him so (g).

In a Suit to obtain a Transfer, or for an Injunction to prevent it, the Plaintiff, by *Stat. 39 and 40 Geo. 3. c. 36*, is enabled to proceed, without making either the *Bank of England*, the *South Sea Company*, or the *East India Company*, a Party to the Suit; but the Act seems to be optional, and not imperative, and does not preclude the

(a) 3 P. Williams, 310.
14 Ves. 245.

(b) 1 Ves. 426. 2 Bro. C. C.
252, 332. 6 Ves. 143. 7 Ves.
287. 5 Madd. Rep. 19.

(c) 3 P. Wms. 310. 1 Ves.
426. 15 Ves. 164.

(d) 14 Ves. 152. 2 Vern.
380.

(e) 2 Atk. 234. Red. Tr.
Ch. 153. 1 Anstr. 37. 1 Sch.
and Lef. 227.

(f) 2 Atk. 320. 15 Ves.
164. Cowp. Pl. 42. 2. Madd.
Cl. 185.

(g) 1 Meri. 122.

Plaintiff from making these Companies Parties if advisable. But in a recent Case, the Vice-Chancellor said, that he would dismiss the Bill with Costs, against the Bank, wherever they were *unnecessary* Parties, as in the Cases provided for by the Act, to be *personally* paid by the Plaintiff or the Solicitor, the Statute being otherwise rendered useless (a). A Bill will lie for an Account by a Principal against the Agent employed to sell goods for him; and by one Partner against a co-Partner, without praying a Dissolution of Partnership (b).

To enter further on this Subject would exceed the Limits of this Work, it may be sufficient to conclude by observing that, in some Cases, it may still remain a Question of considerable difficulty, who are necessary Parties to a Suit. It may indeed be doubtful, until the Decision of the Cause, what Interests may be affected by that Decision; and sometimes Parties must be brought before the Court to litigate a Question, who had, according to the Decision, no Interest in the Subject; and as to whom therefore, whether Plaintiffs or Defendants, the Bill may be finally dismissed, though the Court may make a Decree on the Subject, as between other Parties, which will be conclusive on the Persons, as to whom the Bill may be so dismissed, but which the Court would not pronounce in their absence, if amenable to their Jurisdiction (c).

In this early Stage, it may be useful to remind the junior Practisers, that by a late Decision, *a Special Authority in writing, from the Client*, must be obtained to institute a Suit in the Court of Chancery; but that to defend a Suit, a general Authority has been held sufficient (d.)

Bills requiring an Affidavit to be annexed, are, in Suits, to obtain the Benefit of an Instrument, upon which an Action at Law would lie, alledging that it is lost, and that the Plaintiff cannot therefore have any Remedy at Law.

(a) 3 Madd. Rep. 386.
6 Ves. 770.

(b) 1 Madd. 373. 143.

(c) Red. Tr. C. 116.

(d) 3 Meri. Rep. 12.

An Affidavit of the Loss must be annexed to, and filed with the Bill, (see title Affidavit) or a Demurrer will hold (a): so, in Suits for Discovery of Deeds or Writings (b), sometimes praying Relief, founded on the Deeds and Writings of which the Discovery is sought: if the Relief be such as might be obtained at Law, if they were in the Custody of the Plaintiff, he must annex to the Bill, an Affidavit that they are not in his Custody or Power, and that he knows not where they are, unless they are in the hands of the Defendant: but if the Bill be for a Discovery *merely*, or only prays the Discovery of Deeds or Writings, or equitable Relief grounded on them, an Affidavit is not required (c). It is also unnecessary in the Case of a cancelled Instrument to have another Deed executed. But it may be proper to remark, that a Suggestion of the Evidence of Plaintiff's Demand not being in his Power, is so essential to a Bill under these circumstances, that if there be no such Charge on the Bill, it would be ground for a Demurrer (e). And to a Bill of Interpleader, a Plaintiff must annex an Affidavit that there is no Fraud or Collusion between him and any of the Parties; and if any Money is due, he must bring it into Court, or at least offer so to do by his Bill (f): To a Bill for Examination of Witnesses *de bene esse*, an Affidavit must be annexed of the Circumstance, by means of which the Testimony may be lost, as the advanced Age of the Witness (seventy), or the Infirmary and his Intention of leaving the Kingdom, or being the only Witness (g): the Want of the requisite Affi-

(a) Red. Tr. Ch. 43. 346.
1 Ves. 346.

(b) In an Action at Law, a Production of Deeds, &c. is obtained by summary Process. 1 Taunt. 166.

(c) Gilb. For. Rom. 521.
2 P. Wms. 541. Nels. Rep. 78.

(d) Mosc. 192. 3 Anstr. 859.

(e) 3 P. Wms. 395. Rod.
Tr. Ch. 100.

(f) Red. Tr. Ch. 40. Banb.
303. 3 Bro. C. C. 36.

(g) Red. Tr. Ch. 121. 1 P.
Wms. 117. 3 P. Wms. 117.
1 Atk. 140.

davit would be a Defect of which the Defendant might avail himself by Demurrer. And though the Plaintiff may have been convicted of Perjury, his Affidavit will be sufficient for the Purpose of the Discovery (*a*).

HILARY TERM, 1820.

The different kinds of Bills, used for the Purpose of instituting an original Suit, or of adding to, continuing, or obtaining the Benefit of a Suit already instituted, or of a Cross Suit, and the several other Pleadings in this Court are with such Ability treated of in the Work of the noble and learned Author referred to in the preceding Pages, and in the very able and elaborate Performances of later Writers (*b*) that a general Reference to them may serve the Purposes of the following Treatise: it may be sufficient, therefore, to observe that the Draft of the Bill may be prepared by the Solicitor, and laid before Counsel for his Perusal and Signature; and, in very urgent Cases, where the least Delay may be attended with very mischievous Consequences, much time may be saved; but as great professional Experience and Judgment is required, it will, in most Cases, be found more advisable to lay full and proper Instructions before a Junior Counsel, and in perplexed and difficult Questions, it would be prudent to take the Opinion of a Senior Counsel, upon the fitness of the Bill for its intended Purpose, and which may ultimately save much Expense and Disappointment.

The Fee to Counsel for drawing, perusing, settling and signing the Draft of the Bill, as the Practice now stands, seems to depend upon the Length, and in many Cases, perhaps, that Mode of ascertaining the Fee is proper; but Instances sometimes occur, where the Observance of such a

(*a*) Ball and Bea. 567.

Pr. in Chan. and Rep. by H.

(*b*) Pl. in Chan. and Rep.
by Sir Geo. Cooper, Prin. and

Maddock, Esq. Pleas by
Beaves, Esq.

Rule would be manifest Injustice. Cases may happen where a much larger Fee ought to be given, where the Brevity and Conciseness of the Bill, selected from a large Mass of Materials, demonstrates the Attention and Judgment of the Pleader, and certainly furnishes no Ground to infer that the Labour has not been equally as great as when an irregular desultory Statement in the Shape of a Bill has been substituted, abounding with Argument and impertinent Declamation. The Attorney-General's Fee for signing an Information where there are not more than three Defendants, £1 12s. 6d. and 2s. 6d. for every other Defendant.

The Bill must be transcribed on Parchment with a Five Shilling Stamp on each Skin. The Transcript must be in Words at length, and not in Figures: but the Skin is restricted to no particular number of Sheets; as much may be comprised in each Skin, so as to be fairly legible. The Transcript should be very carefully examined with the Draft of the Bill, and the Signature of the Counsel written at the Foot of the Bill: it is then to be delivered to the Clerk in Court at his Seat in the Six Clerks' Office in Chancery Lane, to be filed.

The first Process against a Defendant (not entitled to Privilege of Peerage, or a Lord of Parliament a Bishop) is a Subpœna to appear to, and answer the Plaintiff's Bill, which by the Statute 4 Ann, c. 16. should be previously filed with the proper Officer of the Court: but by the present Practice, the Subpœna is sometimes, though very irregularly, and at the Risk of Costs, issued before the Bill is filed. The Bill, however, should be filed by the Return of the Subpœna, otherwise the Defendant may refuse to appear, and he must be served with Process *de novo*, or he may give Instructions to his Clerk in Court to appear, and if he finds that the Bill was not regularly filed, he may prefer Costs for the Irregularity, in an Injunction Cause to stay Waste, or Proceedings at Law, there it should seem that, by the Statute,

the Bill need not be filed until the Return of the Subpœna; but the Plaintiff may obtain an Order to retain his Bill upon payment of Costs out of Purse.

To obtain a Subpœna to appear and answer a Præcipe and a Warrant, upon a Five Shilling Stamp, to prosecute, must be left at the Subpœna Office in the Rolls Yard, Chancery Lane, in the following Form.

In Chancery.

“ Subpœna *George Allen, James Gordon, and*
 “ *John Clarke*, to appear in Chancery, re-
 “ turnable the 23d of January, at the Suit of
 “ *Thomas Beckett and another.*”

Kensit, 18th Jan. 1820.

If there are more Plaintiffs than one, the first Plaintiff only is to be named in the Præcipe: thus, “ at the Suit
 “ of Thomas Beckett and another,” or “ others,” as the case may be. So an Infant Plaintiff who sues by his *Prochein Amy* or next Friend: in the Præcipe, after naming the Plaintiff, must be added, “ an Infant by his next Friend,” and in like manner, a married Woman when she sues by her next Friend. And where a Man and his Wife are Defendants, the Præcipe for the Subpœna should be for John Doe and his Wife to appear, &c.

Three Defendants only can be included in one Subpœna; the Christian and Surname of each Defendant must be inserted at length; Husband and Wife are considered as one Defendant; but if the *separate Estate* of the Wife is intended to be charged, as she is considered to be a *Feme Sole* for other Purposes, it should seem that she must be *separately* served with a Subpœna (a).

Where there is one Defendant or two, there is but one Label to the Subpœna; if there are three Defendants, an additional Label is annexed to the Writ, for which Sixpence is charged. The Subpœna for one or two Defendants is eight Shillings; for three, eight Shillings and Sixpence.

(a) 9 Ves. 488. Gilb. For. Rom. 40.

At a private Seal the Fee is three Shillings and Sixpence, and for opening the Seal two Guineas extra. *Lord Eldon* has discontinued the Gift Seals.

And care should be taken that there is no Mistake in the Præcipe left for the Subpœna either in the Parties' names, Plaintiff or Defendant, or in the Return: any such Mistake vitiates the Writ. So if the Label and the Body of the Writ do not agree, the Party served may avail himself of the Mistake.

When the Defendants reside in London, or within ten Miles, it may be necessary, in the Vacation, to obtain a Subpœna returnable immediately, for the Course of Practice to obtain which, see hereafter in Trinity Vacation; but against an Officer of the Court, it should seem that it may be obtained without the usual Affidavits, he being presumed to be always in attendance (a); in all other Cases the Subpœna must be made returnable on some certain Day in Term: and therefore a Subpœna returnable immediately is never sued out in Term Time.

The Standing Orders of the Court direct, that if the Subpœna be against only one, the Body of the Writ under Seal should be left at such Person's Place of Abode, or that he may be served with the Label, if he should be met with *personally* (b); but if one or two more are in the Subpœna, two are to be served *personally*, and the Body under Seal shewed to them, at the Time of such Service; and the Body may be served *personally*, or left at the House of the other Person (c). In the latter Case, the Body should be left *with some one of the Family* at the dwelling House or Lodging, and where there are more Defendants than one, a Copy of the Label should be taken, to enable the Person who served the Writ, to make an Affidavit of Service, to ground Process to en-

(a) Mos. Rep. 42.

(b) 1 Anstr. 79. 3 Atk. 567.

(c) Ord. in Canc. Beam.

Ed. 171.

force Appearance. The Label requires *personal* Service in all Cases; leaving at the House is not good (a).

Service before, or on the Return Day of the Subpœna, at any Time before 12 o'Clock at Night on that Day, is good (b): Service on a Sunday is not good Service (c).

Service on the Wife is good Service on the Husband, if the Writ under Seal be left with her at the Husband's Place of Abode; but it seems doubtful whether leaving a Label with the Wife would be good Service on the Husband. But if the Subpœna be against both, Service upon the Husband alone, would be good Service upon both: and for Default of Appearance, an Attachment may be issued against him (d).

Service by leaving the Writ under Seal hanging upon the Defendant's Door, or put into the House under the Door, or within the Window, where a Defendant keeps his House shut up, if it can be shewn by Affidavit to have come to the Hands of the Defendant, will be good Service. And sending a Subpœna to a Defendant under Cover to the Person to whom he desired the Plaintiff to address his Letters, has been by Order made good Service (e). The Court has also made an Order for Service of a Subpœna upon the Mother or Father-in-law of an Infant, where the Mother secreted Infants, Parties to the Suit (f). And if the Defendant be a Prisoner within the Rules of a Prison, the Court will make an Order for Service of the Subpœna upon the Turnkey of the Prison. If the Defendant be a close Prisoner, no Order seems necessary; but in both Cases personal Service is to be preferred; but no Process can be served upon a Prisoner, committed at the

(a) Gilb. For. Rom. 153.
3 Atk. 567.

(b) 2 Burr. 812. 1 T. R. 234.
102.

(c) 19 Ves. 367.

(d) Ca. 71. 92 Toth. 11. 13.

(e) 5 Ves. 147. 3 Taunt.

(f) 8 Ves. 141. Dick. 18.

77, 353. 2 Atk. 70.

Suit of the Crown, without leave (*a*). Service by leaving a Subpoena at the Lodgings of a Defendant, who had left them twelve Months previous, has been held not to be good Service, though an Order had been obtained for that Purpose (*b*). And where Defendants are out of the Jurisdiction of the Court, Service of a Subpoena, on their Clerk in Court, will not be good Service, though they have by such Clerk in Court filed a Bill relative to the same Subject (*c*); nor in a Cross-Cause, although the Defendants are numerous, and some live out of the Jurisdiction, and others not to be found, will the Court substitute a Service upon the Clerk in Court in the original Cause (*d*); but where there has been only one Defendant in a Cross-Cause, the Court has made the Order for Service upon the Clerk in Court in the original Cause (*e*). Where a Defendant, residing out of the Jurisdiction, has given a Power of Attorney to a Person, to act for him in the Management of his Affairs, the Court has refused to allow Substitution of Service of the Subpoena to appear and answer on such Person (*f*); and Substitution of Service of Subpoena has been refused, where one Defendant resided out of the Jurisdiction, and though the other admitted, by his Answer, that he had a Power of Attorney from him to receive the Arrears of an Annuity then due, which it was the Object of the Bill to set aside (*g*).

In some Instances the Court has upon an Affidavit by the Plaintiff of the Merits of the Suit substituted a Service (*h*); where a Party is abroad, or goes out of the Way, and there is a Person whom he has named in Court as his Agent, and whom the Court can look upon as such; as in an Injunction Cause, where the Attorney at Law is an

(*a*) Prac. Reg. 403.

(*f*) 1 Soh. and Lef. 238.

(*b*) 2 Vern. 369.

2 Meri. 458, over-ruling 1 Dick.

(*c*) Bro. C. C. 386. 2 Cox's 26 and 39.

Rep. 889.

(*g*) 2 Meri. 458.

(*d*) 3 Bro. C. C. 429.

(*h*) 3 Madd. 350.

(*e*) 4 Bro. C. C. 478. .

Agent, constituted by the Person making the Demand, for the Purpose of prosecuting that Demand at Law, and the Suit in Equity, is a Defence to that Demand; the Court will, upon Motion or Petition, and Affidavit, make an Order that Service of the Subpœna on the Attorney at Law, be good Service on the Defendant in Equity (*a.*) Nor does it seem necessary that the Affidavit to ground the Application for the Order should state a previous Refusal by the Attorney to accept the Subpœna; but it should seem that the Court will not order the Answer of such Attorney to be put in without Oath (*b.*) And where an amended Bill had been filed, and the Defendant had appeared upon two Motions, and lived abroad, out of the Jurisdiction, and had not been served with the Subpœna, and the Answer being very important, he refused to put in any Answer, the Court made an Order that Service of the Subpœna upon the Clerk in Court, or the Solicitor, should be good Service (*c.*) And if there be a general Letter of Attorney to one, to appear to and defend Suits, the Court will order such Attorney to appear for the Principal, and that Service on him should be deemed good Service (*d.*) It does not seem that an Agreement between a Mortgagor and Mortgagee, authorizing two Attornies, who were not Parties, to receive a Subpœna for the Mortgagor in a Bill to be filed for a Sale or Foreclosure, will be sufficient to induce the Court to order Service of Subpœna on them to be good Service (*e.*)

Service of a Subpœna upon a Defendant while abroad, or in Scotland, seems to be good, but (*f.*) not upon a Foreigner, residing in a foreign Country (*g.*)

(*a.*) 1 Sch. and Lefr. 239.

3 Bro. C. C. 12. 429. 4 Ves.

359. over-rules 3 Br. C. C. 24.

2 Cox Rep. 389. 3 Madd. 350.

(*b.*) 13 Ves. 593.

(*c.*) 6 Ves. 170.

(*d.*) 1 P. Wms. 523.

(*e.*) Dick. 579. Ham. Dig. 531.

(*f.*) 4 Pro. C. C. 213. 18 Ves. 496. 2 Madd. Ch. 199.

(*g.*) Bro. Ch. 83.

If a Bill be filed against a Corporation, the Process must be served on some one of the Members (a).

And where a Bill is filed against two Partners, one being abroad, the Service of Subpœna upon the Partner in England, has by Order been deemed good Service (b). So Service on one Defendant, who was Agent and late Partner of another Defendant abroad, was ordered to be good Service on the latter, in a Suit to stay Proceedings at Law (c).

If the Defendant appears, it cures all Irregularities in the Service of the Subpœna: a very respectable Writer has stated, that if it be just before the long Vacation, and the Defendant chooses rather to appear than be liable to an Attachment, it should seem that he is still at Liberty to insist upon not being served at all, or irregularly served (d).

It may be useful to the junior Practisers to observe, that if any Objection is to be taken to the Regularity of filing the Bill, the issuing the Subpœna, or the Attachment, or subsequent Proceeding under it, or of any Error in the Names of the Parties, the Affidavit of Service, the Return, or Form of the Writs, it must be made before an Appearance is entered; as in the Instance of a Defendant residing very remote in the Country, served by leaving a Subpœna in London, and an Attachment, for want of Appearance, issued irregularly, a *cepi corpus* returned, and an Order made for a Messenger, an Appearance entered, and an Order obtained for six Weeks time, as in a *Country Cause*: upon Motion to discharge the Order for Irregularity, the Court held, that *if there was any Objection to the Service of the Subpœna, the Defendant should have moved to set aside the Attachment instead of entering an Appearance, as in a Town Cause*, that having done so the Cause must be therefore so considered, and the Order discharged with Costs (e).

(a) Hinde, 87.

(b) 1 Madd. Rep. 187.

(c) Bunb. 107. Dick. 26.

(d) 3 Atk. 567. Madd. Prin.

and Pr. 130. *quæ tamen*.

(e) 3 Madd. 434. Gilb. For. Rom. 49.

If on the Service of the Subpœna, the Defendant beat the Person serving it, or contemptuous Words are spoken against the Court or the Process, upon Motion supported by Affidavit of two Persons, it should seem the Court will commit without further Examination. A single Affidavit, where contemptuous Words are used, will be sufficient to ground an Attachment, for the Examination of the Offender; and if confessed, or proved, he will be committed; if only proved by the Affidavit of the Party complaining, he will be discharged, but without Costs; and although the Court will not, upon the Oath of one Person, commit in the first Instance, it will make an Order *Nisi* for a Commitment: but in punishing Contempt, the Court exercises a sound Discretion on the Subject, and considers whether the Party acted under a *Mistake* or *contumaciously*; (a) but while the Court protects those acting under its Process, it will not countenance any improper Conduct; where an Attorney's Clerk, in serving a Subpœna, wantonly abused and insulted a Defendant, the Court advised the Defendant to seek Redress by Indictment; the Clerk was convicted and fined £5, and held to his good behaviour (b).

When the Defendant resides in *London*, or within *twenty* Miles, the Cause is termed a *Town Cause*; if the Defendant resides beyond that Distance, a *Country Cause*: and where some of the Defendants reside in *London*, or within *twenty* Miles, and others beyond that Distance, the Cause is considered as a Town Cause in regard to the former, and a Country Cause as to the latter. A Defendant, therefore, has Time to appear if he resides in *London*, or within twenty Miles thereof, and has been served four Days or more before the Return of the Subpœna until the Return Day, but if served on the Return Day, or a Day or two before, then four Days after the Service: so if the De-

(a) 3 Atk 218. Ord. Canc. (b) Rex v. Carlton, Middle-
 Beam. Ed. 204. 17 Ves. sex Sessions, Dec. 1810.
 61. 1 Ves. and Bea. 297.
 1 Meri. 302.

Defendant resides in the Country, then eight Days after the Return Day, unless he has been served eight Days before, in which Case he must appear on the Return Day of the Subpoena, and if served four or five Days before the Return, he has then four or five Days after the Return to appear, and in Default an Attachment may issue. It is laid down in a Work of authority, that to a Subpoena returnable the last Day of Term, the Defendant has till the first Return of the Term following to appear (a).

If the Subpoena be returnable *immediately*, and the Defendant is served within *ten* Miles of London, the Distance to which the Writ is restricted, the Defendant must appear within four Days, exclusive of the Day of Service. Where a Subpoena was served on a Defendant at a House in London, who resided in Yorkshire, and an Attachment issued for want of Appearance, and an Appearance as in a Town Cause was entered for him, it was held to be a Town Cause (b).

A Party may, without having a Subpoena served upon him, appear *voluntarily* to a Bill, and refer it for Impertinence, plead, answer, or demur, &c., and does not lose his Costs by such *voluntary* Appearance (c); but although a Defendant is not bound to appear before the Return of the Process, yet if he does so, he is in Contempt after eight Days from the Appearance (d).

The Plaintiff's Solicitor, at the Return of the Subpoena, must apply to his Clerk in Court to be informed, if the Defendants have appeared. The Appearance of every Defendant must be obtained and enforced, if necessary, before the Cause can regularly proceed; but it is usual to wait a few Days after the Return of the Subpoena, before an Attachment issues to compel an Appearance, except in an Injunction Cause, in which, upon Default of Appear-

(a) Prac. Reg. Wy. Ed. 36.

(b) 3 Madd. 434.

(c) 1 Ves. 386. Dick. 38.

2 Bro. C. C. 279.

(d) 5 Madd. Rep. 422.

ance, an Attachment must be applied for, and sealed as speedily as possible, to ground an Application for the Injunction.

Where the Defendants are numerous, and a Defendant within the Jurisdiction of the Court (*a*) refuses or neglects to appear or answer, the Plaintiff cannot proceed to a Hearing of the Cause; he must go through the line of Process to enforce the Appearance or Answer of the outstanding Defendant, to a Sequestration (*b*), and take the Bill *pro Confesso*. For this Purpose it is requisite that the Bill should have been regularly filed, and the Defendant served with a Subpœna to appear and answer, and upon a Search at the Six Clerks' Office, the Defendant's Neglect in not entering an Appearance, or not answering, clearly ascertained, the Default is termed a Contempt of the Orders of the Court, and the Proceeding under it, *Process of Contempt*: to enforce Obedience to the Orders of the Court, the Solicitor for the Plaintiff must leave with his Clerk in Court, an Affidavit of the Service of the Subpœna, (*c*) with Instructions to make out an Attachment directed to the Sheriff of the County or City where the Defendant is resident or dwelling, to attach him for such Contempt, so as to have him in Court to answer his Contempt at the Time in the Writ mentioned. By the Standing Orders of the Court, all Process of Contempt must be made out into the proper County where the Party against whom the same issues be resident or dwelling, unless he shall be then in or about London, in which case it may be directed into the County where he shall then be; and every Suitor must do his best endeavour to procure each Process to be duly served and executed, upon pain of very good Costs to the Defendant, and losing the Benefit of the Process (*d*).

(*a*) 2 Atk. 510.

(*c*) Ord. Can. Bea. Ed.

(*b*) Pre. Ch. 99. 1 Vern. 169.

227. 1 Ves. 395. 7 Ves. 206.

(*d*) Ord. Can. Bea. Ed. 61.

199.

If the Defendant resides in the Cinque Ports, or the Counties Palatine of Chester, Lancaster, or Durham, the Attachment must be directed to the Chamberlain of the first, the Chancellor of the second, and the Bailiff of the last, commanding him to issue his Mandate to the Sheriff to attach the Party; and to enforce Obedience, it is necessary to obtain an Order, which is of course upon the Chamberlain, to return the Writ, and afterwards an Order upon the Sheriff to return the Mandate: * the Writ must be made returnable in Term; and in proceeding adversely to a Sequestration, or to take the Bill *pro Confesso*, there must be fifteen Days between the *teste* and return of the Attachment, and of each subsequent Process: an Attachment returnable within eight Days of the Purification, means eight entire Days (a): the Affidavit of Service of the Subpœna must be filed at the Affidavit Office, previous to issuing the Attachment, which it is in strictness incumbent upon the Clerk in Court to do, or the Attach-

* The Delay occasioned by this Practice was brought under the Consideration of the Court, by an Application for concurrent Orders upon the Chancellor of Lancaster to return the Writ, and also upon the Sheriff to return the Chancellor's Mandate, grounded upon the Practice of the Courts of Law, in issuing several Rules for the like Purpose on the same Day. Lord Eldon could not reconcile the Difficulty in making an Order upon the Sheriff to return a Mandate, before it is known that he has a Mandate to return, that the Court could not make an Order upon the Sheriff until it was informed that he had disobeyed the Chancellor's Mandate; If he did not return the Mandate because he had not got it, could he be Committed for not doing that which is not in his power? If it could be made consistent, it would be a desirable thing. How the Courts of Law had got over the Difficulty, his Lordship desired to be informed: the Matter is *sub judice*, and it is probable the Practice may be assimilated to that of the Courts of Law. *Falkland v. Braddock*, Hilary Term, 1823.

(a) 1 Meri. 243.

ment would be Irregular (*a*). If the Defendant resides in or about London, within ten Miles, an Order may be obtained, upon Petition to the Master of the Rolls, supported by an Affidavit (*See* title, *AFFIDAVIT, and PETITION*), or upon Motion, to make the Process of Contempt returnable immediately (*b*). The Attachment is issued of course by the Plaintiff's Clerk in Court, without any Order; the Purpose for which it is issued is indorsed on the Writ, as *for want of an Appearance, or for want of an Answer*, the Clerk in Court must, previous to issuing, enter the Writ, and the Cause for which it issued, in the Register's Book; if not so entered, it might be set aside for Irregularity (*c*). It should seem that an Attachment, for want of Appearance, cannot be regularly issued before the Bill is entered in the Bill Book of the Six Clerks' Office, though filed by the Six Clerk (*d*). And if an Attachment is sealed before the Party is in Contempt, it is irregular, though it be not executed until after he is in Contempt, and the Party is entitled to Costs; but Actions at Law for false Imprisonment, and maliciously suing out the Attachment, have been restrained by the Court, without prejudice to an Application for Costs at Law, or a Compensation (*e*). The Sheriff, if he executes the Writ, must do so before the Return: upon mesne Process he may accept Bail to Appear or Answer, which he usually does by taking a Bail-bond in the Penalty of 20*l.*, by two Sureties, for Defendant's Appearance or Answer, as indorsed on the Writ: the Sheriff is not obliged to take Bail, nor would an Action on the Statute 23 Hen. VI. c. 9, lie against him for refusing (*f*): if Defendant neglects to enter an Appearance, or to put in

(*a*) Ord. Can. Bea. Ed. 142.
169. 8 Ves. 357.

(*b*) Ord. Can. Bea. Ed. 102.

(*c*) 2 P. Wms. 657. Ord.
Can. Bea. Ed. 110. 4 Madd.
179.

(*d*) 1 Wils. Rep. 264. 1
Ves. 53. Prac. Reg. Wy. Ed.

51, 2.

(*e*) 1 Jac. and W. 655. 664.

(*f*) 1 Hen. Bl. 468. 6
Taunt. 569.

an Answer, the Bail-bond ought not to be put in Suit, nor would the Court suffer an Action for the Penalty of the Bond to proceed ; but if an Action at Law should be commenced, the Defendant should immediately apply by Motion or Petition, for an Order to restrain the Plaintiff from proceeding, upon entering an Appearance, or putting in an Answer, and of clearing the Contempt by payment or tendering the Costs ; or if any Irregularity should be discovered in filing the Bill, in issuing the Subpoena or filing the Affidavit of Service, or in issuing the Attachment, the Defendant might avail himself of the Error ; and by a Motion or Petition, supported by an Affidavit of the Facts, and notice given, discharge the Attachment with Costs ; but it should seem that he ought not to enter an Appearance, which would be a waiver of the Irregularity. Where the Sheriff took a Bail-bond from a Defendant upon an Attachment, and delivered the Bond over to the Plaintiff's Solicitor, upon an Order *nisi*, to bring in the body, Lord Hardwicke allowed the Delivery of the Bond as sufficient Cause shewn by the Sheriff, and discharged the Order (a). Where a Party had been taken on an Attachment, for want of Appearance, and had given a Bail-bond, the Court of Exchequer held, that as it had satisfied the Contempt, the Party's only Remedy was on the Bail-bond, however inadequate, and refused a Messenger (b). The Course of Practice is to apply to the Sheriff to return the Writ, and upon Neglect or Refusal, to move as of course for an Order upon the Sheriff to make a Return by a certain Day, and in default, to move, upon an Affidavit of Service of the Order and the Neglect to make the Return, for an Order of Commitment against the Sheriff (c). If a *Cepi Corpus* be returned, (d) and the Defendant has been admitted to Bail, the Plaintiff must move as of course upon producing the Writ and

(a) 2 Atk. 507. 2 Br. C. C.
181.

(b) 6 Price Rep. 32.

(c) Dick. 555.

(d) 2 P. Wms. 657.

Return, for an Order for the Messenger to apprehend the Defendant: the Order must be drawn up, passed, and entered at the Register Office, and delivered to Mr. Peacock, in Lincoln's-inn-fields, the Messenger of the Court, with Instructions for apprehending the Defendant (*a*). The Messenger goes into every County, without restriction (*b*) or regard to distance; upon receipt of the Order, the Messenger will obtain a Warrant to take the Defendant, and, upon a Caption, he must bring him in Custody to the Bar of the Court without delay;* and if Defendant obstinately persists in refusing to enter an Appearance, or to put in an Answer, or to pay the Costs of Contempt, the Court will make an Order for his Commitment to the Fleet Prison, until he Appears and Answers, and pays the Costs of Contempt. And if he stands out further in Contempt, the Defendant must be brought up by the usual Writs of *Habeas Corpus*, *Alias*, *Pluries*, and *Alias Pluries*, and the Bill taken *pro Confesso*, which are made out by the Clerk in Court, upon an Order of course upon Motion or Petition: a Defendant may apply for an Order to move himself: but the Defendant will be entitled to his Discharge upon clearing his Contempt, which is by entering his Appearance, or putting in his Answer, and paying or tendering the Costs of Contempt incurred, and the Court would, if necessary, make an Order for his Discharge out of Custody (*c*): it should be observed that an Acceptance of the Answer, before the Costs are paid, would be a waiver of the immediate pay-

(*a*) 3 Madd. 114.

(*c*) Ord. Can. Bea. Ed. 200.

(*b*) 1 Vern. 116. 154. 2 P. 1 Madd. Rep. 109.

Wms. 301. 7 Ves. 230.

* There seems to be some doubt as to the Messenger taking Bail upon a Mesne Process and his Fees; upon Orders for payment of Money, or higher Contempts, he certainly cannot (*a*): The Question is now pending in a Court of Law. *Peacocke v. Sandys*, Hilary, 1823. C. B.

(*a*) Pre. Ch. 331. Com. Rep. 264.

ment of Costs of Contempt (*a*). And where a Defendant has been Discharged out of Custody, upon promising to put in an Answer, and the Costs of Contempt have been accepted, and no Answer has been put in to authorize the Clerk in Court to make out another Attachment, an Order for that Purpose seems necessary (*b*). If the Defendant should be in the *actual* Custody of the Sheriff upon other Detainers, either under Sentence for a Misdemeanour (*c*), or for Forgery (*d*), he must be brought up by *Habeas Corpus cum causis*, and if Detainers are lodged against him, while in Custody for the Contempt a Discharge from the Commitment under the Contempt will not discharge the subsequent Detainers (*e*); but merely to charge the Defendant in Custody, it should seem, that leaving the Attachment in the hands of the Sheriff, would have that Effect (*f*).

Where a Defendant was in Custody upon an Attachment, for want of Appearance, and the Sheriff had returned a *Cepi Corpus*, but from the Defendant's weak State of Health, extreme Infirmary, and peril of her Life, he did not remove her, an Order was made for a Messenger (*g*). The Distance is not an Object of Consideration by the Court: if the Defendant, after the Caption by the Sheriff, has been suffered to go at large, so that the Messenger cannot take the Defendant into Custody, he must make a Return of *Non est Inventus*, upon which it should seem that the Court will make an Order for a Sequestration (*h*). Some doubt seems to have been entertained, whether an Order for a Serjeant-at-Arms ought not to be obtained previously (*i*). After a *Cepi Corpus* returned, no farther Process of Contempt issues (*k*.) If a Defendant has been taken

(*a*) 1 Ves. and Bea. 100.
3 Madd. 390. 15 Ves. 174.
1 Madd. 531. Ord. Can. 250.

(*b*) Anon. Trin. 1821.

(*c*) Dick. 711.

(*d*) 1 Ves. and Bea. 78.

(*e*) 10 Ves. 328.

(*f*) Dick. 658. 661.

(*g*) 7 Vcs. 230.

(*h*) 3 Madd. 114. Mose.
301.

(*i*) 2 Bro. C. C. 181.

(*k*) 2 Bro. C. C. 181.

1 Vern. 344.

upon an Attachment, for want of Answer, upon Payment of the Costs of Contempt, he may obtain an Order for a Commission to take his Answer, but not a Plea or Demurrer (*a*), and if a Demurrer should be returned with the Answer it would be irregular, and the Court would order both to be taken off the File; but if the Plaintiff, after an Answer and Demurrer has been filed, obtains an Order for a Messenger, before the Demurrer and Answer have been taken off the File, although an Office Copy has been bespoken, the Order for the Messenger will be discharged with Costs, to be taxed, and Time given to put in an Answer (*b*); and upon payment or tender of Costs of Contempt to an Attachment, a Defendant in Custody may obtain an Order for a Commission to take his Answer, and a Month's time to return the Commission (*c*); if an Answer is put in the same Day on which an Attachment for want of Answer issues, the Attachment has precedence (*d*), though it may not be strictly regular in treating of Mesne Process, to introduce Process in execution, it may not be improper to observe, that the Sheriff cannot take Bail to an Attachment for not paying Costs, or Money under an Order of Court, if he does, upon Affidavit of the Facts, the Court will, upon Motion or Petition, make an Order upon the Sheriff for payment of the Money indorsed on the Attachment, or that he stand committed to the Fleet Prison (*e*).

If the Defendant cannot be taken upon the Attachment, the next Process is *an Attachment with Proclamation*, which is issued by the Clerk in Court, without any Order, upon producing and leaving with him the Attachment, with the Sheriff's Return of *Non est Inventus* indorsed. This Writ is made returnable in Term, or immediately, as the preceding Process, and in like manner must have

(*a*) 3 Madd. 42.

(*b*) 1 Swam. 185. et seq.

(*c*) 3 Madd. 42.

(*d*) 1 Madd. 551.

(*e*) 11 Ves. 170. Com. Rep.

264. Pre. Ch. 331. Gilb. Rep.

84. Bea. Costs. 138, 250.

Fifteen Days between the teste and Return, and be entered by the Clerk in Court with the Register. By the Orders of Court, after a Contempt duly prosecuted to an Attachment with Proclamations returned, no Commission to answer shall be made, nor any Plea or Demurrer admitted; but upon Motion in Court, and Affidavit made of the Party's Inability to travel, or other good Matter to satisfy the Court touching the Delay (a).

The next Process is a *Commission of Rebellion*, which is made out by the Clerk in Court, according to the Course of Practice, without any Order, upon producing to him the Attachment with Proclamations returned *Non est Inventus* by the Sheriff. This Writ is to be directed to Commissioners, generally Four, and the Names of such Persons must be given to the Clerk in Court, with Instructions to make out the Process; there must be Fifteen Days between the teste and Return. The Commissioners are directed jointly or severally to attach the Party for want of an Appearance, or for want of an Answer, as the Case may be, wheresoever he shall be in Great Britain, so as to have him in the Court of Chancery at the Time in the Writ mentioned, and the Commissioners should use their utmost Endeavour to apprehend the Defendant before they make their Return; it has been laid down that the Party may be taken on a Sunday, and that Force may be used in breaking Doors in execution of the Process (b), but it would not be adviseable to run into Extremes; it should seem that the Commissioners have Authority to take Bail for the Defendant's Appearance on the Return of the Writ (c); but if Bail is not taken, the Commissioners must bring up Defendant to the Bar of the Court without Delay, they have no Power to detain him unnecessarily in Prison; if by their Negligence Defendant es-

(a) Ord. Can. Bea. Ed. 178.

(c) 1 Hen. Bl. 468. Dick.

(b) 1 Atk. 57. Gilb. For. 7. Carey. 261.

Rom. 76.

comes out of Custody, the Court will make an Order for Commitment of the Commissioners (a); if any Irregularity should happen in executing the Process, the Court will take upon itself to correct and punish the Offence, and not suffer the Party to proceed at Law: and if the Process should have issued irregularly, the Defendant will be discharged out of Custody, with Costs, by Motion or Petition to the Court (b).

An Order for the *Serjeant at Arms* attending the Court of Chancery to take the Defendant into Custody is the next Process, and must be applied for if the Commission of Rebellion be returned *Non et Inventus*. The Order is obtained by giving Instructions to Council, with the Commission of Rebellion and Return indorsed, to move for an Order for the Serjeant at Arms to take the Defendant, which is of course, and the Commission must be delivered to the Register in Court, with the Name of the Clerk in Court; the Order in some Cases may be obtained upon Petition to the Lord Chancellor (c), though not usually applied for in that Shape; the Serjeant at Arms, or his Deputy, generally takes upon himself to draw up the Order, and to get a Warrant thereon from the Lord Chancellor, after which he applies to the Plaintiff's Clerk in Court, or Solicitor, for Instructions (d); if the Party should be apprehended by the Serjeant at Arms, he must be brought up in Custody to the Bar of the Court to answer the Contempt, and if he persists in his Refusal, Instructions must be given to Council to move that Defendant be committed to the Custody of the Warden of the Fleet Prison, which the Court, after admonishing Defendant of the Consequence of his Obstinacy, will order as of course; but upon entering his Appearance, or putting in his Answer, and Payment or Tender of the Costs of Contempt, the Party is entitled to his Discharge; if the Defendant should be taken for

(a) Toth. 38. 381.

(c) Dick. 285.

(b) 1 Vern. 269. Ord.
Can. 199.(d) Ord. Can. Bea. Ed.
302. 323.

want of an Answer, he is not to be kept in Custody waiting for the Master's Report while the Examination, whether the Answer is sufficient or insufficient, is proceeding (a); if the Serjeant at Arms refuses to discharge him, the Defendant must apply by Motion or Petition upon a Certificate from the Clerk in Court, that his Answer has been filed, and that the Costs of Contempt have been tendered or paid, as the Case may be, and the Court would make an Order for his Discharge, which must be served upon the Serjeant, or his Deputy, having the Defendant in his Custody, a Refusal to obey the Order would be a Contempt of the Court (b); but if, after Process to a Serjeant at Arms has been issued but not executed, an Answer has been put in, and excepted to, and Defendant has submitted to answer the Exceptions, and no further Answer has been put in, the Plaintiff may carry on the Process, and obtain an Order for the Serjeant at Arms to apprehend the Defendant (c); he should not begin the Process of Contempt *De Novo* (d), and therefore must not accept the Costs of Contempt until a full Answer has been put in. Where an Order for the Messenger had issued upon Mesne Process for want of Answer, and an Answer had been filed, excepted to, and reported insufficient, the Court decided that the Plaintiff might carry on the Process of Contempt, and obtain another Order for a Messenger, but not if he had accepted the Costs of Contempt, he must then begin with the original Process (e); but although the Plaintiff may be entitled to move for an Order for a Serjeant at Arms immediately on the Disallowance of Exceptions to the Master's Report of an insufficient Answer, he waives it by taking out a Subpoena for a better Answer, and then excepting to the Report, the Defendant being thereby entitled to Eight

(a) Dick. 134. 11 Ves. 151.

16 Ves. 418. 4 Bro. C. C. 223.

(b) 16 Ves. 418. 1 Madd. 109.

(c) 16 Ves. 418.

(d) 2 Ves. 110.

(e) 2 Ves. and Bea. 372.

Days to put in an Answer after the Exceptions are disposed of (a); if the Defendant cannot be apprehended, the Serjeant at Arms must make a Return of *Non est Inventus* upon the Back of the Lord Chancellor's Warrant, which in strictness should be filed at the Report Office, before a Sequestration grounded upon it can be regularly issued (b). An Error in the Process may be rectified after Execution, though discovered after Answer put in (c).

The Costs of this Process, are taxed, not Liquidated Costs, as upon the foregoing Process.

The *Commission of Sequestration* upon Mesne Process is the next and last Process of Contempt, and it is issued upon the Return of *Non est Inventus* by the Serjeant at Arms. By the Orders of Court, this Process cannot be granted upon Petition (d). To obtain an Order for a Sequestration, the Warrant to the Serjeant at Arms, and the Return by him of *Non est Inventus* indorsed thereon, must be given to Council, with Instructions to move, as of course, for an Order for a Sequestration against the Defendant. The Order must be drawn up, passed, and entered at the Register Office, and delivered to the Clerk in Court, with the Names of the Persons, four or more, to whom the Commission is to be directed, to make out a Commission, empowering them to enter upon all the Defendant's real Estates, and to sequester into their Hands the Rents and Profits thereof, and also all the Goods, Chattels, and Personal Estate of the Defendant; and to keep the same under Sequestration until he shall have appeared or fully answered, as the case may be, cleared his Contempt, and the Court make other Order to the contrary. The Commission under Seal must be delivered to the Commissioners, or one of them, with proper Instructions for executing it, and if, after diligent Search, they cannot discover that Defendant is possessed of any real or personal Property, they must make a Return in Writing upon the Back of the Commission to that effect. It should be

(a) 19 Ves. 379.

(b) 3 Atk. 579.

(c) Dick. 136.

(d) Ord. Can. Bea. Ed. 215.

observed, that where a Sequestration issues as Mesne Process of Contempt for want of an Appearance or Answer, it is only to ground the ulterior Proceeding to take the Bill *pro Confesso*; the Sequestrators cannot proceed farther than entering into possession and receipt of the Rents and Profits of the real Estates Freehold or Copyhold (a), for the Land is not affected by the Sequestration (b), and of the personal Estate, which they ought to do *bonâ fide*, and not nominally, or in collusion with the Defendant (c); and for this Purpose they have been justified in breaking Locks (d). A very respectable Author, in treating of the Practice of the Court, states, that where a Defendant refuses Admittance, and keeps his Doors shut, the Court, upon Certificate of the Fact by the Commissioners, would make an Order enjoining the Defendant to deliver Possession to the Sequestrators, and upon Service of the Order and Disobedience, an Attachment may be issued, which is of course, and not to be executed; and upon this the Court will make an Order for a Writ of Assistance to put the Sequestrators into possession (e). There seems to be considerable Doubt whether *Choses in Action* can be taken under a Sequestration on Mesne Process (f). The Proceeds and Dividends of Bank Stock cannot be sequestered (g). Stock is not liable to the Payment of Debts during the Life of the Proprietor in any way, except under a Commission of Bankruptcy, nor if it stands in a Trustee's name (h), whether a Judgment Creditor can have any Relief against Money in the Funds, has been questioned (i). The Salary of an Equerry to one of the Royal Family (k) cannot be sequestered, nor should it seem, can a debt. (l)

(a) 1 Barnard. 431.

(b) Dick. 107.

(c) 1 Ves. jun. 86.

(d) 2 Meri. 397.

(e) Dick. 695.

(f) Ambl. 421. 3 Bro. C. C.

72. 4. Ves. 735. 2. Ves. and

Bea. 184.

(g) Ball and Bea. 387,

390.

(h) 2 Ball and Bea. 233.

(i) 15 Ves. 577. 2 Cox, 235.

(k) 1 Cox, 315.

(l) Ibid. 2 Ball and Bea.

vilege of Parliament, upon the Return of Process of Sequestration, refusing to enter an Appearance, the Court may appoint a Clerk in Court to enter an Appearance for him (*a*). This is more fully treated of in a subsequent Part of this Work: a Sequestration is also the first Process against Officers of the Court. If a Clerk in Court be in Contempt for not Answering, a Sequestration *nisi* is the first Process to enforce an Answer; the ancient Practice of suspending or forejudging him from his Office, has been altered (*b*), if the Warden of the Fleet is in Contempt for not Answering; the like Process issues to compel an Answer (*c*). This Process, like all the preceding, when issuing as Mesne Process, may be Discharged upon the Defendant's clearing his Contempt for which the Process issued, and paying the Costs incidental thereto: if a *Cepi Corpus* be returned to any one of the foregoing Writs, the Process of Contempt is at an end.

The Writ of *Habeas Corpus* issues at the Suit of either Plaintiff or Defendant. The Plaintiff, in carrying into effect the Mesne Process of Contempt, has recourse to this Writ, to remove a Defendant into the Custody of the Court from the Custody of the Sheriff, the King's Bench Prison, or any other Custody, for the Purpose of issuing a Sequestration (*d*), or as auxiliary to the Proceedings, to take the Bill, *pro Confesso*; for the latter Purpose the Defendant must remain in the Custody of the Court; an *Alias Habeas Corpus* cannot issue to remove the Defendant from any other Custody (*e*). To ground an Application for an Order for a Sequestration, the Defendant may be brought up by this Writ, if confined for a Misdemeanor, or for Felony, and turned over to the Fleet Prison, *pro forma*, and carried *instante* to the Prison, from whence he was

(*a*) 16 Ves. 436.

(*b*) Dick. 635, and the Reasons for altering the Practice.

(*c*) Mos. 235.

(*d*) 2 Anstr. 579. Dick. 625.

2 Ch. Rep. 151. 192. 1 Cox, 194.

(*e*) 1 Ves. and Bea. 306.

removed, *cum causa* (a). If the Defendant is in Custody upon Civil Process in Execution, or there are other Detainers against him, an Order for a *Habeas Corpus cum causis* must be obtained, and he will be, in like manner, turned over to the Fleet Prison, charged with such Execution, and all other Matters he stood charged with in the Custody from whence he came; but a Discharge from the Commitment under the Contempt will not Discharge the Detainers (b). A Defendant in Custody upon other Detainers, might be charged in Custody, by leaving an Attachment with the proper Officer in whose Custody he is, without removing him by *Habeas Corpus* (c). By the same Course of proceeding, a Defendant in Custody may obtain an Order for a Writ of *Habeas Corpus* to remove himself to the Fleet Prison. This Writ issues as of course upon an Order obtained by Motion or Petition, producing the Attachment or other Process with the Return of *Cepi Corpus* indorsed: the Instructions to Counsel, or the Petition answered, must be left with the Register, and the Order drawn up, passed, and entered, and left with the Clerk in Court, with Directions to make out the Writ to the Sheriff, or Person having the Custody of the Party: the Return is always on a Day certain, in or out of Term; there is no precise Time limited between the *teste* and Return, nor between the Return of one Writ, and the issuing of another; but if the Bill is taken, *pro Confesso*, a separate Order must be obtained for each Writ, and the Defendant brought up thereon: it would save much Time and Trouble to make the Writ Returnable either on some Day in Term, or on a Seal Day, that when the Defendant is brought up, and he stands out in Contempt, Instructions may be given to Counsel to move at the same time for an Order for an *Alias Habeas Corpus*, and upon the Return, similar Instructions to move for a *Pluries Habeas Corpus*; and lastly for an Order for an *Alias Pluries Habeas Corpus*,

(a) Dick. 711. 1 Ves. and
Bea. 78.

(b) 10 Ves. 328.

(c) Dick. 658. 661.

upon which the Court will proceed to take the Bill, *pro Confesso*. This Process is to be served by delivering the Writ, under Seal, to the Sheriff, or other Person to whom it is directed, and in whose Custody the Defendant is detained at the Time of Service, keeping a very correct Copy of the Writ. If obedience be not paid to this Process, an Application should be made to the Court by Motion, supported by an Affidavit of the Service, and the Neglect or Refusal, for an Order upon the Sheriff, or Person in whose custody Defendant is detained, to make a Return immediately, or that he stand committed: the Court would probably, in the first instance, make an Order *nisi*; this Order should be served personally, by delivering a correct Copy, passed and entered, and the original Order shown at the time of Service; and if the Terms of the Order are not complied with, Instructions must be given to Counsel to move for an Order for Commitment absolutely, upon an Affidavit of Service of the former Order, and any material Facts attending the Proceedings, which must be put in force by delivering the original Order either to the Serjeant-at-arms, or to the Warden of the Fleet, to whom the Execution of the Order is directed, or the Party may pursue his Remedy under the Stat. 30 Car. II., c. 2.

Where the High Bailiff of the West Riding in Yorkshire had received a Writ of *Habeas Corpus cum causis*, and had afterwards discharged the Defendant out of Custody under an Insolvent Act, the Court declared him guilty of a Contempt in discharging the Defendant, and ordered him to stand committed, unless Cause shown to the contrary, which Order was afterwards made absolute for a Commitment (a). The Lord Chancellor can issue the Common Law Writ of *Habeas Corpus* in the vacation time (b).

To make the Process of Contempt effective, the Plaintiff must proceed to take the Bill, *pro Confesso*. The Sequestration, though executed, and the Defendant's Property seized and kept sequestered, does not, in any wise affect

(a) Dick. 89.

(b) 1 Buck. 264.

the ulterior proceeding to take the Bill *pro Confesso* (a). If the Defendant be in the Custody of the Court (the Fleet Prison) at the Suit of the Plaintiff, upon any one of the preceding Processes of Contempt, Instructions must be given to Counsel to move for a Writ of *Habeas Corpus*, to be directed to the Warden of the Fleet Prison, to bring the Defendant up to the Bar of the Court; or if the Defendant be in any other Custody, and charged with other Detainers, a Writ of *Habeas Corpus cum causis*: to take a Bill, *pro Confesso*, the Defendant, if in Custody, must be removed to the Prison of the Court; the Demand being trifling, is not sufficient to induce the Court to dispense with the Necessity of bringing the Defendant up from a County Prison by *Habeas Corpus* (b). The Defendant being brought up by the *Habeas Corpus* in Custody, the Court will admonish him of the Consequence of his Contempt; and if it be for want of Answer, a Day is usually given him to put in his Answer, and Counsel should be instructed to move that the Defendant be Remanded; or if brought up from a County Prison, he be turned over to the Fleet Prison, and at the same time to move for an Order for an *Alias Habeas Corpus* to bring him up at a future Day, (See *Title, Habeas Corpus*) and if the Defendant stands out in Contempt, Writs of *Pluries Habeas Corpus*, and of *Alias Pluries Habeas Corpus*, must be successively issued; and if, when brought up on the latter, the Defendant persist in his contumacy, and no Appearance has been entered, Counsel must be instructed to move that the Court would direct an Appearance to be entered for the Defendant, pursuant to the Stat. 5 Geo. II. c. 25. (c) and for an Order that the Bill may be taken, *pro Confesso*, and that the Plaintiff's Clerk in Court may attend with the Record: where there is only one Defendant, it should seem that an Order to take the Bill, *pro Confesso*, may be obtained upon *Motion*, and

(a) 2 Atk. 21.

(b) 3 Atk. 690.

VOL. I.

(c) 1 Bro. C. C, 388, 9.

2 Dick. 662.

that it is not necessary to set down the Cause for Hearing to obtain the Order (a). If the Defendant be *not in Custody*, or there *are other Defendants*, and the whole line of Process of Contempt to a Sequestration has been regularly issued against the Defendant, an Order must be obtained for setting down the Cause to take the Bill, *pro Confesso*, as against such Defendant, and that the Plaintiff's Clerk in Court may be ordered to attend with the Record of the Bill, for which Purpose the Solicitor must apply to his Clerk in Court for a Certificate of the Sequestration having issued, and that the Defendant stands out in Contempt, signed by the Six Clerk, and Instructions with the Certificate given to Counsel to move for an Order as of course to set down the Cause to be heard, *pro Confesso*: the Order must be drawn up, passed, and entered at the Register Office, and the Cause set down in the Paper for Causes (See *Title Hearing*); and the Court, upon Production of the Record, will make an Order for taking the Bill, *pro Confesso*, as against that Defendant, which must be drawn up, passed, and entered; and when the Cause comes on to be heard against the other Defendants, the Order for taking the Bill, *pro Confesso*, must be produced.

The Order for setting down the Cause to be heard, *pro Confesso*, may be discharged, and the Defendant let in to Answer, if he has not lain by too long (b); but the Court will regard the Application very strictly, and expect the Defendant to state the kind of Answer he intends to put in, and that it be upon payment of Costs (c); that if the Costs are not paid, unless the Plaintiff's Solicitor should unwarily have taken an Office Copy of the Answer, the Court will make an Order to take the Answer off the File for Irregularity. If the Plaintiff accept the Answer, it is a Waiver of the Costs (d). An Answer put in upon Re-

(a) 3 Ves. 372. 281.

(b) 2 Bro. C. C. 279.

(c) 11 Ves. 77.

(d) 11 Ves. 202.

ference reported insufficient (a), or, it should seem, a Demurrer, a Plea overruled, or where the Bill has been amended, an Answer to the original Bill, and no Answer to the Amendments, will not prevent the Bill being taken *pro Confesso* (b).

Where a Defendant, to prevent being brought up by an *Alias Habeas Corpus*, as often as he was turned over to the Fleet, removed himself back to the King's Bench Prison, the Court ordered that if he did not put in his Answer by the time an *Alias Habeas Corpus* would have issued, that the Bill should be taken *pro Confesso* (c). So where a Defendant went armed, that he could not, without personal Danger, be served with Process, it was considered as absconding (d); but the Process to take the Bill, *pro Confesso*, will not lie to a County Goal, for instance, Newgate; if Defendant be confined there, under a Criminal Process, if brought up by an Order of the Court, and turned over to the Fleet Prison, he must be immediately carried back to Newgate, and cannot be kept an instant: the *Alias Habeas Corpus* cannot issue, except to the Prison of the Court; and a Difficulty, not less material, as being an Objection of Form, is, that a Defendant so circumstanced is not in a Place where the Process of the Court can reach him (e).

By Stat. 5 Geo. II. c. 25, where a Defendant does not enter an Appearance within the usual Time after a Subpoena issues, and is justly suspected to *abscond to avoid the Process*, the Court out of which the Process issues, upon Motion or Petition, supported by a sufficient Affidavit of the Absconding, may make an Order, appointing a Day for the Defendant's Appearance; a Copy of which Order must be inserted in the *London Gazette*, and published on the Lord's Day, in the Parish Church of the Defendant,

(a) 2 Atk. 24. 3 Ves. 209.

(b) 4 Ves. 619.

(c) Dick. 535.

(d) 2 Atk. 2.

(e) 1 Ves. and Bea. 78. 306.

15 Ves. 179. 3 Ves. 471. 573.

and a Copy of the Order must be posted up in some public Part of the *Royal Exchange*, in *London*: and if the Defendant does not enter an Appearance within the Time limited, the Court may proceed to make a Decretal Order to take the Plaintiff's Bill, *pro Confesso*, with the usual Directions, and may order the Defendant's Estate and Effects to be sequestered, and the Plaintiff's Demand paid and satisfied thereout, upon the Plaintiff's giving Security for Restitution, if the Defendant should afterwards enter an Appearance; but upon the Plaintiff's Refusal to give the Security required, the Estate and Effects are to remain under the Direction and Controul of the Court, until such Appearance is entered; and it may be useful here to observe, that a Decree, *pro Confesso*, would not be opened, but upon strong ground, not upon a general Affidavit of Derangement by the Party (a); nor would the Court suffer it to be impeached *collaterally*, but only upon Bill of Review, or a Bill filed to set it aside for Fraud (b). And if the Defendant should be brought up by *Habeas Corpus*, and refuse to Appear, the Court may order an Appearance to be entered, and the Cause may proceed as if the Defendant had actually appeared. Persons out of the Realm, or absconding at the time such Decree is pronounced, if they become publicly visible within *seven Years* after the Decree, must be served with a Copy of the Decree; or, if dead, their Heirs, &c. And if Persons so served, do not, within *six Months*, Petition for a re-Hearing, the Decree is to be absolutely confirmed; but a Defendant, within *six Months* after Service; or if not served within *seven Years* after making such Decree, on Petitioning for a re-Hearing, and giving Security for Costs, is to be admitted to put in an Answer, and the Cause is to be heard again; the Act is not to affect Persons beyond Sea, unless it shall appear by Affidavit that such Persons had been in England within *two Years* next before the Subpoena issued.

(a) 2 Ves. and Beam. 184.

(b) 13 Ves. 563.

To proceed against an absconding Defendant under the above Clause, the Court requires that the Affidavit upon the Application for the Order, should state that the Defendant *has been in England within two Years* (a) before the Subpoena issued, and that the Defendant has gone Abroad, or absconded, to avoid being served with the Process: the Depo-
nent's *Information and Belief* would not be sufficient; the Affidavit must state from whom by Name, the Depo-
nent received such Information (b). Where a Person had been Abroad upwards of two Years, and had been outlawed, and it was satisfactorily shown *that he con-
tinued Abroad* to avoid being served with Process, the Court, upon the Equity of the Statute, made an Order, that the Defendant should enter an Appearance within a limited Time (c). An Order under this Act has been made for a Defendant to appear, notwithstanding the Subpoena had been served (d), and an Attachment had issued; the Party *absconding* to avoid the Attachment (e).

If the Minister of the Parish prevents an Order for the Defendant's Appearance being published, pursuant to this Act, he is indictable for a Contempt (f): and where the Parish Church was under Repair, so that the Order could not be published there, pursuant to the Statute, the Court made an Order, enlarging the Time for Defendant's Appearance (g). This Statute extends to Bills of Revivor and Supplement (h).

By a late Act (i), Bills may be taken, *pro Confesso*, against Persons having privilege of Parliament, standing out Pro-
cess of Contempt to a Sequestration, for want of Appear-
ance; upon Return of the Sequestration, the Court may appoint a Clerk in Court to enter an Appearance, and the Cause may proceed in the usual Course (k); and where the Bill is for a *Discovery* of Matters to be used as Evidence

(a) 5 Ves. 113.

(f) 2 Atk. 114.

(b) Barn. Ch. Rep. 401. 403.

(g) Dick. 74. 1 Ves. and

(c) 2 Ves. j. 188. sed. vid.

Bea. 305.

5 Ves. I.

(h) 3 Atk. 690: Dick. 293.

(d) 1 Bro. C. C. 388, 9.

(i) 45 Geo. 3. c. 121.

(e) Dick. 662.

(k) 6 Ves. 437.

at Law, and the Defendant appears, or an Appearance is entered on the Statute, if the Defendant does not put in an Answer within the regular Time, the Court may make an Order to take the Bill *pro Confesso*, unless Cause shown to the contrary, within eight Days after Service of the Order: and the Bill may be read in any Court of Law, as Evidence of the Facts therein stated, as if admitted by the Defendant in his Answer (a).

Where *Husband* and *Wife* are Defendants, Process of Contempt may be issued against the Husband for Default of Appearance or Answer of the Wife (b), unless they live separate, and she refuses to join: After putting in his Answer, upon Affidavit of having no influence over her, and living separately, he may obtain an Order for Stay of Process against him, or his discharge out of custody, for want of his Wife's answer (c): or where the Husband is abroad (d), an Order may be obtained *upon notice*, for the Wife to answer separately, or if served with Subpoena, that an attachment may be issued against her (e); but after an Order to answer separately, she is entitled to all the Orders for Time, and not bound by any previously obtained by her Husband (f).

The Appearance of an *Infant* Defendant must be enforced by Attachment, which is not to be executed. An Order for a Messenger must be applied for by Motion of course, and the Messenger will procure a Warrant thereon, and bring the Infant into Court; and if no Person offer to become his Guardian, the Course is for the Court to assign the Senior Six Clerk, not towards the Cause, to be his Guardian to appear and answer and defend the Suit. As an Infant Plaintiff is not answerable for costs, so he does not, when Defendant, pay the costs of contempt; the Plaintiff pays the Messenger (g).

(a) 17 Ves. 368.

(b) Prac. Reg. Wy. Ed. 53.

(c.) 3 Madd. 472 1 Sim. and Stu. 163.

(d) Dick. 373. 1 Ch. ca. 296.

(e) Pre. ch. 328. 1 Sim. and

Stu. 162.

(f) 1 Sim. and Sta. 161.

(g) Dick. 287. Bea. Costs

108.

The Appearance of the *Attorney-General* cannot be enforced by Process, nor will the Court make an Order upon him to appear; if he refuses, it will be considered as *nil dicit*: the Court of Exchequer has appointed a short Day for him to answer, or in default, the Bill to be taken *pro Confesso* (a).

Where a *Corporation* aggregate refuse to appear or answer, or to perform the Decree of the Court, no Attachment lies; a Writ of Distringas must be issued, which is made out as of course, without any Order by the Clerk in Court, upon leaving the Affidavit of Service of the Subpoena, with Instructions to what Sheriff or other Officer the Distringas is to be directed, to Distrain them by their Goods and Chattels, Rents and Profits, till they obey the Order of the Court; this Writ must be entered by the Clerk in Court, with the Register, and in proceeding to a Sequestration, there must be fifteen Days between the *teste* and Return: the Writ must be delivered to the Sheriff, to whom it is directed; the Cause of issuing it is specified on the back of the Writ; and, at the Return, the Sheriff must be called upon to return what Issues he has levied, usually forty Shillings. If the Corporation stands out in Contempt, the Distringas returned by the Sheriff must be left with the Clerk in Court, with Directions to make out an *Alias Distringas*, and in like manner, if necessary, a *Pluries Distringas*; and if the Corporation obstinately persist in their Contempt, Instructions must be given to Counsel to move, upon the *Pluries Distringas* returned, for an Order for a Sequestration, and the Order must be drawn up, passed, and entered, at the Register Office, and left with the Clerk in Court, with Instructions to make out a Sequestration, which must be put in force as in other cases, and for which Instructions have been given, under title SEQUESTRATION.

Where the Company had no Goods, the Members, in

(a) Dick. 730. 2 Ves. 729. 1 Fowl. Excheq. 452.

their private Persons, were made liable (a); and, upon an Order for a Sequestration *nisi*, the Court refused an Application by a Corporation, to enter an Appearance with the Register upon the Distringas, for that the Appearance could be of no Service to a Corporation which cannot be Committed (b); and where a Subpoena for Costs had been served upon the Mayor of a Corporation, on non-payment, an Order for a Distringas issued (c).

This Process may be discharged upon entering an Appearance or Answer, or Performance of the Duty specified on the back of the Writ, and the Costs of the Sequestrators, and Costs of Contempt, and, if necessary, the Court will, by Motion or Petition, make an Order for that purpose. If an *Idiot* or *Lunatic* be Defendant, and so stated by the Bill, the Committee will be appointed Guardian *ad litem*; if not so stated, or no Committee appointed, or he is interested, or refuses to act, an Order must be obtained, upon Affidavit of the lunacy, for appointing a Guardian (d): a Plaintiff may apply for an Order to appoint a Guardian to put in the Answer (e).

The Appearance of the Defendants having been obtained, the following Rules are to be observed. In a Town Cause, the Defendant is entitled to three Orders for Time to answer; one for a Month, another for three Weeks, and another for a Fortnight. In a Country Cause, the Defendant cannot be called upon for an Answer in the Term wherein his Appearance is entered; he has until the first Day of the next Term, to sue out a Commission to take his Answer, which is termed in Practice *craving a dedimus*; but on the Commencement of the ensuing Term, he may be called upon for his Answer; and he is then entitled to three Orders for Time to Answer; one for six Weeks, another for a Month, and another for three Weeks. But in

(a) 2 Vern. 396.

(d) Fowl. 478. Red. Tr.

(b) Prec. Ch. 128, 9, 131.

Ch. 95. Dick. 460.

(c) Dick. 73, and see 3 Mori.

(e) 5 Madd. 423.

every Case, if a third Order be required, the Defendant must, by his Clerk in Court, enter his Appearance with the Register in four Days, consenting that the Serjeant at Arms shall go against him, as on a Commission of Rebellion returned *non est inventus*, in case his Answer is not put in within the Time granted; so on a second Application for Time to answer an amended Bill, or after Exceptions allowed, the like Terms are put upon the Defendant; but under special Circumstances, Defendant is not precluded from making Application to the Court for further Time.* The Plaintiff's Solicitor should therefore watch carefully for the Expiration of the respective Orders which the Defendant may have, either by the Practice or the Indulgence of the Court. Calling for an Answer, means a Note in Writing, which must be given by the Plaintiff's Clerk in Court, (at the Request of the Solicitor) to the Defendant's Clerk in Court, informing him that an Attachment will immediately issue for Want of the Answer. And it should seem that the Clerk in Court cannot regularly issue an Attachment for Want of Answer, unless a Note in Writing has been given two Days previously.† To prevent the issuing of the Attachment the Defendant's Solicitor obtains the Orders for Time to put in the Answer allowed him by the Court.

EASTER TERM, 1820.

The Defendants taking the usual Time allowed them by the Course of the Court, cannot be compelled to put in their Answer this Term; nothing is therefore to be done by the Plaintiff's Solicitor, but to watch the Defendants, that they do not obtain an Order for longer Time to prepare their Answer than allowed by the Practice.

* Ord. Canc. 23d January, 1794. Beam. Ed. 455. 2 Meri. 142.

† Hand's Chanc. 33, see Order for setting aside an Attachment with Costs.

TRINITY TERM, 1820.

The Defence to a Suit in Chancery may be by *Demurrer*, *Plea*, *Answer*, or *Disclaimer*; of these, an *Answer* is generally that Mode of Defence, which is resorted to by a Defendant in a Suit for the Administration of Assets, the Nature and Form of which, as also of such other Modes of Defence by *Demurrer*, *Plea*, or *Disclaimer*, as a Defendant may be advised to adopt, will be found in a subsequent Part of this Work, where the Proceedings on the Part of a Defendant are treated of and explained; it will be sufficient, therefore, here to observe, that the Course of Proceeding to obtain the Defendant's Answer, is the Object to which the Attention should be called in this early Stage of the Suit. The Defendant not having complained of *Scandal* or *Impertinence* in the Bill, it may be presumed to be free from any objectionable Matter. When the Answers have been got in, the Plaintiff's Solicitor must bespeak Office Copies from his Clerk in Court, and before he takes them from the Office, he should be satisfied of their accuracy, and that they have been correctly examined with the Record of the Answer: if it should be insisted that there is a Mistake in the Office Copy, the Court will direct the Original Answer to be sent for from off the File (a): and he should likewise take care that the Office Copies are signed by the Six Clerk, as well to ascertain that the Answers have been regularly filed, as also to prevent an Objection to the reading them, by the Six Clerk at the Hearing, and the Cause standing over, upon payment of Costs of the Day to the adverse Party, which, by the Standing Orders of the Court, are directed to be paid by the Solicitor (b). The

(a) 2 P. Wms. 425.

(b) Ord. Can. Bea. Ed. 186.
289 in Not. 1 Cox, 437.

Answers should be carefully perused, to see that the Bill be fully answered. In general it is advisable to lay the Pleadings before the junior Counsel who prepared and signed the Bill, to advise whether the Answers be full and sufficient, and free from impertinent or scandalous Matter ; and, in perplexed and intricate Cases, before a senior Counsel, for his Opinion as to the Course of future Proceedings in the Cause. Cases may, however, arise in which the Solicitor may be obliged to take upon himself to act upon his own Judgment of the Sufficiency of the Defendant's *Answer* : it may be useful, therefore, to recapitulate some of the leading Points to which his Attention may be directed.

If an Answer admits the Facts stated in the Bill, or such as are material to the Plaintiff's Case, and states no new Facts, or such only as the Plaintiff is willing to admit, no further Pleading is necessary ; the Answer is considered as true, and the Court will decide upon it ; but if an Answer does not admit all the Facts in the Bill, *material* to the Plaintiff's Case, or states any Fact which the Plaintiff is not disposed to admit, the Truth of the Answer, or of any Part of it, may be denied, and the Sufficiency of the Bill to ground the Plaintiff's Title to the Relief he prays, may be asserted by a Replication, which concludes the Pleadings (*a*). It has been laid down as an invariable Rule, that whatever Part of a Bill is not covered by a *Demurrer*, *Plea*, or *Disclaimer*, must be defended by *Answer* (*b*). If a Party has a Right to Relief, he has a Right also to an Answer to every Allegation in the Bill, the Admission of the Truth of which, or the Proof of the Truth, is necessary to entitle him to that Relief (*c*) ; the Plaintiff may require this Discovery, either because he cannot prove the Facts, or in aid of Proof, and to avoid Expense (*d*) ; or to substantiate the Proceedings, and make them effectual in a Court of Equity (*e*). And

(*a*) Red. Tr. Ch. 14.

(*b*) Ibid. 248.

(*c*) 7 Ves. 267.

(*d*) 2 Atk. 251.

(*e*) 2 Ves. 492. Rod. Tr.
Ch. 249.

it should be also remarked, that to so much of a Bill as is necessary for the Defendant to answer, he must speak *directly*, and without *evasion*, and must not *merely* answer the several Charges *literally*, but he must confess or traverse the *Substance* of each Charge (a); and where a specific Combination is charged, a direct Answer must be given; a general Denial will not be sufficient; but a Defendant is not obliged to answer Facts to which he is Interrogated, if there is nothing in the stating and charging Part of the Bill to warrant the Interrogatory (b); if Defendant, however, answers such Facts, and they are replied to, they are effectually put in Issue, though not charged in the Bill (c). Wherever there are *particular* and *precise* Charges, they must be answered *particularly* and *precisely*, and not in a *general manner*, though the general Answer may amount to a full Denial of the Charges (d); as in the Instance of a Suit for a general Account, where the Bill charged the Receipt of particular and specific Sums, with many Circumstances respecting the Times when *received*, of *whom*, and on *what Account*, it was held that setting forth a general Account of all the Sums received, by way of Schedule, referring to it as a full Account, was not sufficient; that a specific Answer must be given to each of the several Charges. Nor is an Answer, going no further than to enable Plaintiff to go into the Master's Office, by long Schedules, in an oppressive Way, sufficient; the Answer must give the best Account, referring to Books and Vouchers, so as to make them Part of the Answer (e). If a Bill prays an Admission of Assets, or an Account of the Personal Estate, and does not *require*

(a) Ord. Can. Bea. Ed. 179. 6 Ves. 792. 1 Bro. C. C. Prac. Reg. Wy. Ed. 11. 503.

(b) 1 Atk. 53. Red. Tr. Ch. 36. (e) 4 Ves. 217. 226. 8 Ves. 193. 1 Ball and Beatt. 324.

(c) 1 Ves. 538. Red. Tr. Ch. 250. n. 1 Meri.

(d) Red. Tr. Ch. 250. 347.

Defendant to set forth such Account, he seems not to be bound to do so; and a *Submission to Account*, would be sufficient (a). But in a Suit by a Defendant, suing as next of kin against an Executor, who, by his Answer, denies the Foundation of the Bill, the Right of Plaintiff, as next of kin (b): or denies that there is a Balance of Account against the Testator's Estate, he need not set forth an Account of the Personal Estate by way of Schedule (c); if, however, the Fact does not lie *in his knowledge*, although he denies it, he must admit Assets, or set out an Account (d). And in a Suit, claiming Tollage by Prescription, where Defendant, by his Answer, denied Plaintiff's Title to compel a Discovery, he must establish his Right at Law (e); but although a Defendant, by his *Answer, denies the Title of the Plaintiff*, yet, in many Cases, he must give the Discovery, though not material to the Plaintiff's Title and though the Plaintiff can have no Benefit from the Discovery, as in a Tithe Cause, praying a Discovery of the Quantity and the Value of the Land, though Defendant claims a Modus, or Exemption, or denies Plaintiff's Title, he must answer as to the Quantity of Land, and Value of the Tithes (f). So where the Discovery is in any degree connected with the Tithe, Defendant cannot protect himself by *Answer*, from making the Discovery (g). And in considering the Sufficiency of the Answer, the junior Practisers should be informed, that if the Discovery sought by the Bill is matter of *Scandal*, or will subject the Defendant to any *Pain, Penalty, or Forfeiture*, or prejudice him as a Purchaser for valuable Consideration, without Notice (h), he is not bound to make it; and that, if he does not think proper

(a) 1 Cox, 58.

(b) Amb. 354.

(c) 4 Ves. 107.

(d) Hard. 188. Red. Tr. Ch. 251.

(e) Ambl. 612.

(f) Banb. 60. Red. Tr. Ch. 251. Hard. 130.

(g) Red. Tr. Ch. 252.

(h) 15 Ves. 370.

to Defend himself by *Demurrer* or *Plea*, he may do so by *Answer* (a).

It should seem that if a Defendant *Answers at all*, he *must Answer fully*; and the Practice seems to be so considered; this, however, has been the Subject of much Controversy (b); but in support of this Practice, in a recent Case, it has been held that a Defendant cannot, by Answer, object to Answering, though he may by *Plea* (c); and *Lord Eldon* seems to have expressed an Opinion, that a Defendant could not Answer to *Part* of a Bill, and refuse to Answer the rest (d); so that if a Person is made a Party, who has no Interest, but is only a Witness, and submits to Answer, he must Answer *fully* (e); for he ought to have objected by *Plea* or *Demurrer*, but, by Answering, he is not to subject himself to a *Pain*, *Penalty*, or *Forfeiture* (f): under such Circumstances, he is not compellable to answer *fully*; he may, by Answer, insist on not Answering such *Criminal Matter* (g). Where a Defendant has neglected to *Plead* the Statute of Limitations, it seems that it may be insisted upon in his Answer, as if pleaded (h).

Where *Letters* or *Deeds* have been mentioned in a Schedule, and referred to in an Answer, the Court has compelled the Production, not as Consequential, but as Part of the Discovery sought: for not having objected, Defendant must give the whole Discovery; and not as in the Case of a total *Denial of Title*, where the Discovery is merely consequential (i). But it should seem that where a Discovery of a

(a) 3 P. Wms. 238. 1 Ves. 491. 3 Atk. 276.

(b) 11 Ves. 42, 75, 293, 306. 2 Ves. j. 457. 3 Ves. 254. 2 Bro. C. C. 252. 3 Bro. C. C. 239. 4 Bro. C. C. 12.

(c) 3 Madd. Rep. 70.

(d) 16 Ves. 382. 11 Ves. 395.

(e) 2 Bro. C. C. 332. 1 Anstr. 47.

(f) 2 Atk. 276. 1 Swan. 192, 305.

(g) Red. Tr. Ch. 163. 3 P. Wms. 298. 10 Ves. 228, 450.

(h) 2 P. Wms. 144.

(i) 11 Ves. 41. 43.

Correspondence is sought, and Extracts of Letters are set out, and the Answer states them to be the only Parts of the Correspondence on the Subject, it would be sufficient. And the like of Books, left Sealed up (*a*). The Effect of setting forth the Contents of an Instrument, and referring to it, makes it Part of the Answer; but admitting the Execution, and not the Possession, of a Deed, and referring to it, *when produced*: a qualified Submission to produce the Deed, if required, does not deprive the Defendant of taking the Discretion of the Court, as to ordering the Production (*b*).

If, upon perusal of the Answer, the Plaintiff's Solicitor should conceive it to be *insufficient* to the Charges contained in the Bill, he may take *Exceptions* to it, stating such Parts of the Bill as he conceives are not answered, and praying that the Defendant may put in a full Answer; or if the Answer goes out of the Bill, to state some Matter not material to the Defendant's Case, it will be deemed *impertinent*; and if, upon Reference to a Master, it should be so reported, it will be expunged: so in an Answer as in a Bill, if anything *scandalous* is inserted, the Scandal will, upon Reference in like Manner, be expunged by Order of the Court (*c*); but nothing relevant will be deemed scandalous: the Course of Practice, in proceeding upon *Exceptions*, and References for *Scandal* and *Impertinence*, will be found in a subsequent Part of this Treatise.

In concluding these Observations, it may be useful to remark, that *Scandal* and *Impertinence* in an Answer, must be disposed of before its Sufficiency can be considered. A Reference of an Answer for *Impertinence* is waived by a subsequent Reference for *Insufficiency* (*d*). After a Refer-

(*a*) 1 Anstr. 58.

(*c*) Red. Tr. Ch. 39. 253.

(*b*) 4 Bro. C. C. 479. 8 Ves. 257. 3 Atk. 303.

158. 14 Ves. 213. 4 Madd.

(*d*) 6 Ves. 456. 14 Ves.

391. 2 Wils. Ch. 167.

534. 1 Ves. and Bea. 293.

1 Meri. 1.

ence for *Insufficiency*, though the Answer cannot be referred for *Impertinence*, it may for *Scandal* (*a*); in the latter Case, a Co-Defendant is at liberty to apply (*b*); but a Person, not a Party to the Record, cannot; he must seek his Remedy at Law (*c*); but if the Matter of the Answer be *relevant*, of what nature soever it be, it is not *Scandalous*; and nothing is considered as *irrelevant* that may have an Influence on the Suit, having regard to the nature of it (*d*). There does not appear to be any established Rule of Practice, restricting a Reference for *Impertinence* to a certain Period of Time (*e*); even at the Hearing, impertinent Matter has been directed to be expunged (*f*). It seems, however, that after an Answer has been replied to, or after an Undertaking to speed the Cause, there cannot be a Reference for Impertinence, as of Course.

A Suit by Infants, Legatees, or Creditors, against Executors, &c., to have the Trusts of a Will carried into Execution, will show, by the Answer of the Executor or Trustee, the State of the Testator's Property; and if a considerable Sum of Money in the Funds constitutes a Part, it will, in most Cases, be advisable, for the greater Security and Convenience of the Parties interested, to have the Stock transferred to the Accountant-General in trust in the Cause. The same Observation will apply to any large Sum of Money in their Hands; it should be paid into Court, and invested in the Funds; but where the Executors have not a larger Sum than will be sufficient to answer their Costs in the Cause, it should not be taken out of their Possession, as on the Account which will be directed by the Decree to be taken by the Master, the Balance then found in their Hands, will, upon hearing the

(*a*) 2 P. Wms. 312. n.
6 Ves. 453.

(*b*) 6 Ves. 144.

(*c*) 4 Madd. Rep. 252.

(*d*) 6 Ves. 514. 11 Ves.
539.

(*e*) 1 Bro. C. C. 400.

(*f*) 2 Eq. Ca. Abr. 68.

Cause for further Directions, be ordered to be paid into Court.

The *Payment of Money into Court* is generally grounded upon the Defendant's *Admission* in his Answer, or in his Examination before the Master (a), or upon the Master's Report (b): and in some Instances, before the Answer comes in. In a Case of very gross Fraud, upon an Affidavit made in Answer to the Plaintiff's Affidavit in support of a Motion, the Defendant, an Attorney, admitted a large Sum to be in his Hands, the Court made an Order for Payment of the Money into Court (c). And on a Bill filed by a Legatee, upon Defendant's Admission of Assets, and an Offer of Appropriation, the Court ordered a Transfer to the Extent of the Legacy into the £3 per Cent. Annuities in the Name of the Accountant-General (d) to that Account.

It was formerly thought necessary to assign some Cause for calling in the Money, as that the Fund was in danger from Insolvency, or that the Executor or Trustee had abused the Trust, &c.; and upon the Answer admitting the Balance: afterwards the Court permitted the Motion to be made upon the Examination (e); but it should seem that at present, in all Cases where a Balance is admitted, after Payment of Debts, it will be ordered to be paid in (f). And the Defendant cannot object, by alleging that he has lent it upon a Promissory Note, at Interest (g). *Lord Eldon*, has frequently stated the Rule still more broadly, and ordered into Court, all Monies, acknowledged by an Executor's or Trustee's Answer to be in his Hands, except what might

(a) 19 Ves. 117. 3 Bro. C. C. 365.

(b) 3 Ves. 572, 673. 14 Ves. 178.

(c) 6 Ves. 738. 2 Bro. C. C. 158.

(d) 5 Ves. 23.

VOL. I.

(e) Cowp. Ch. Rep. 304. 14 Ves. 178.

(f) 2 Sch. and Lefr. 26. 2 Ball and Beatt. 17.

(g) 3 Madd. 62. Cowp. 6. 2 Sch. and Lefr. 26. Ball and Beatt. 17.

be necessary to be immediately applied (a). And in Suits instituted by Attornies accounting Parties, and an Answer delayed for Years, to prevent the Fund being taken out of their Hands, *his Lordship* has ordered an Answer to be put in within a Week, intimating that the Balance should be admitted, with an Offer of Payment into Court (*b*). So where there is no particular Purpose to be answered by suffering personal Property to remain outstanding in the Hands of a Testamentary Guardian or Executor, the Court will order it to be paid in (*c*). If the Application be founded upon the *Admission* of a Balance appearing to be due from the Schedules to Defendant's Answer or Examination not cast up by him, or from Books of Account referred to, and so connected, as to form part of the Examination, like Schedules to an Answer, the *precise* Sum constituting the Balance must be clearly shewn and verified by Affidavit (*d*); but the Order is not *usually* extended to *Interest* upon *Motion merely*: in one, and perhaps the only Instance, an Order was made by *Lord Eldon* to pay into Court a principal Sum, with Interest, *admitted* by the Answer to have been made to a greater Amount (*e*). Where an Executor *admitted* a large Balance in his Hands, he was ordered to pay the whole into Court, though an Action at Law was depending, for a Debt due from the Testator, with liberty, in case the Plaintiff in the Action should recover, to apply to have a sufficient Sum paid out; and upon the Plaintiff at Law recovering, the Court ordered the Amount to be paid out to the Plaintiff in the Action, and not to the Executor, who had improperly defended the Action, and reserved the Question whether the Executor should not answer *personally* for the Interest and Costs (*f*). So upon

(a) Madd. Ch. 305. 2 Cox's Rep. 377.

(b) 3 Ves. and Bea. 92, and the Case there cited.

(c) 2 Sch. and Lefr. 26.

(d) 1 Bro. Ch. Ca. 57. 14 Ves. 178.

(e) 1 Ves. and Bea. 50, and the Case there cited.

(f) 2 Cox, 377.

Admission of a Balance due to the Testator by the Executor upon an unsettled Account, though Debts outstanding of Testator, who had been dead *three Years*, the Amount was ordered to be paid in (a). And an Executor, acknowledging by Schedule to his Answer that he had received the Testator's Property, and had lent it out on a Promissory Note, was not allowed to protect himself, by alleging an improper Application of it, and was ordered to pay in the Money (b): though Executors have a Power of laying out Money, on *good and sufficient Security*, for an Infant, yet after a Decree for an Account, and Notice by the Prochein Amy, not to lend out the Money on Security, if they lend the Money on Mortgage, they will be ordered to pay it into Court, but not to the Extent of replacing the Amount by so much Stock as the same would have purchased at the Time of Investment (c). And if, by new Interrogatories, the Plaintiff extracts an *Admission* of a further Sum in the Defendant's Hands, it would be ordered to be paid in (d). After a Decree, an Executor cannot deal with the Assets for the Purpose of Investment, without Leave of the Court, which would only be extended to laying out Money on special grounds (e); but it should seem that Money in the Funds, belonging to Wards of the Court, will not be ordered to be transferred to the Accountant-General, to the Credit of the Cause, until the Account is taken, and a Report made by the Master where a Bill has been filed for that Purpose (f). A Person who had received Money on behalf of a Plaintiff, before Institution of a Suit, and not made a Party, has been allowed, by Order, to be at liberty to pay the same into Court (g). The Court have refused Applications for Payment of Money into Court, where a Defendant, by his Answer or Examination, does *not admit* any-

(a) 2 Meri. 491.

(e) 2 Meri. 499.

(b) 3 Madd. 62. Coop. 6.

(f) 1 Bro. C. C. 56. Ham.

(c) 2 Meri. 494.

Eq. Dig. 453.

(d) 19 Ves. 117.

(g) 5 Madd. 75.

thing to be due ; for it should seem that the Plaintiff will not be allowed to calculate the Items of the Schedules, without Reference to the Principle on which the Account is to be taken, and upon an Accountant's View of the Result of an Account, referring generally to *all* the Books of a Partnership, and taking the Balance upon casting up the Cash Book and Ledger *only* (a) ; but *Admissions* in an Answer, which would entitle Plaintiff to a Decree, have been held not sufficient to move for Payment of Money into Court (b). It has also been held not sufficient to cast up Books brought into the Master's Office, unless connected with an *Admission*, to make them Part of the Answer ; as where a Defendant's Answer had been excepted to for not setting out an Account, and Books of Account had been ordered to be deposited in the Master's Office, to be considered as Part of the Answer ; an Application to the Court for Payment of a Balance stated to appear upon such Books so deposited failed : the Court upon the Motion refusing to try the *Items* of an Account (c). And Payment of a Balance upon Charge and Discharge in the Master's Office, before the Report was made, has been refused (d).

Payment of Purchase-Money into Court in Suits for the specific Performance of Contracts, from the Necessity of considering in some measure the Subject, and the narrow Limits of the following Treatise, must form an Apology for the Irregularity in introducing it in this place.

Purchase-Money will be ordered in the ordinary Case of a Purchaser under an Agreement, let into Possession, and the Estate taken out of the Hands of the Owner, upon the Presumption that the Purchaser has waived, or has given Reason to expect that he will waive Objection to the Title : as in the Instance of a Coal-Mine, the Purchaser in Possession, and making a Benefit by working it, the Purchase-

(a) 8 Ves. 68, 91. 14 Ves.
177.

(b) 6 Madd. 98.

(c) Coop. Ch. Rep. 304.

(d) 3 Br. C. C. 45.

Money has been ordered to be paid in (a). *Lord Eldon* seems to have considered that the General Rule would bend to Circumstances, that a Purchaser, *not in Possession*, cannot be required to pay his Purchase-Money till the Title is completed: If, by the Terms of the Contract, he is to have Possession before the Conveyance is executed, the *mere Fact of taking Possession*, under that Contract, will not entitle the Vendor to call upon him for Payment, because the Vendor has a Lien on the Estate for the Amount; but not so as to permit the Purchaser to commit Acts of Ownership to alter the Nature of the Property, which constitutes the Security of the Vendor, against which the Vendee might be restrained by Injunction (b). Where the Possession was according to the Agreement, and the Length of Possession, without Payment of the Residue of the Purchase-Money, sufficiently accounted for from Defect of Title: Improvements, and a Contract to sell Part, was held not to be an Acceptance of the Title, and an Order to pay in the Money was refused. His Honour the Vice-Chancellor has expressed his Opinion, that *each Case must be decided by its Specialties*: for instance, a Vendor permitting the Vendee to take Possession, before the Completion of the Title and a Conveyance; without any Stipulation as to the Purchase-Money, the *bare Act of taking Possession*, by *Consent*, before the Title has been completed, does not entitle the Vendor to have the Purchase-Money paid into Court (c): And more especially if there has been any degree of *Laches* on the Part of the Vendor, in making out the Title, unless the Sale was under a Decree (d). Where the Party was let into Possession, under a mutual Idea that the Title would be speedily settled, and the Delay in the Completion of the Title was occasioned by the Vendee, the

(a) 15 Ves. 317.	18 Ves.	(b) 2 Meri. 105.	3 Madd.
450.	1 Ves. and Bca. 500.	219, 225.	1 Ja. Wa. 673.
1 Meri. 52, 106.	2 Meri.	(c) 1 Madd. Rep. 606.	
110.	4 Madd. 53.	(d) 1 Meri. 106.	Sugd.
		Ven. and Purch. 201.	

Court interposed; but, as His Honour was pleased to express, whether wisely or not has been questioned, since it was the Imprudence of the Vendor in giving Possession, before the Questions upon the Title were disposed of (*a*). But although the Purchaser was in Possession under an Agreement, *Lord Eldon* thought the Plaintiff might require the Defendant to pay in the Purchase-Money, or give up the Possession of the Estate; he could not retain both (*b*), without express Contract, unless at an Occupation Rent, with a Deduction of £5. per Cent. upon the Deposit (*c*). Where the Vendor gets into Possession by the Courtesy of the Vendor, it must depend upon the particular Circumstances whether he shall be compelled to pay in the Purchase-Money before the Completion of the Title (*d*); but if the Purchaser, *after taking Possession*, exercises Acts of Ownership, as erecting new and pulling down old Buildings, throwing two Meadows or Fields into one, cutting down Timber, underletting the Premises, and taking Distresses for Rent; though an Infant Heir be a Conveying Party, he will be compelled to pay the Purchase-Money into Court (*e*); and the Acts of Ownership, the taking Possession, &c. may be brought before the Court by *Affidavit*, in support of an Application for Payment, *after* the Answer has come in, though such Acts are neither charged in the Bill, nor appear in Defendant's Answer (*f*): but it should seem that the Court will not make an Order upon the Defendant in Possession for Payment of the Purchase-Money *before* the Answer comes in, unless under special Circumstances, such as unreasonable Delay, committing Acts of Ownership, by Alteration of the Property, &c. *Lord Eldon* refused to make an Order for Payment of the Purchase-Money, not because the Defendant had not an-

(*a*) 1 Ves. and Bea. 502.

(*d*) 1 Meri. 106.

(*b*) 15 Ves. 317. 1 Meri.

(*e*) 2 Meri. 105, 502.

52. 2 Meri. 141. 4 Madd. 53.

(*f*) 1 Meri. 52. 2 Meri.

(*c*) 1 Madd. 618.

492, 502.

swered, but because the Defendant was *in Possession as Tenant* at the Time he entered into the Contract of Purchase, and his Possession therefore formed no sufficient Reason why he should not retain his Money until the Contract was completed (a); but where a Defendant, in his Character of Purchaser, obtained Possession from the Vendor's Tenant, *without the Consent or Privity* of the Vendor, and upon an Application for the Payment of the Purchase-Money into Court, *before Answer*, it was insisted, on the Part of the Defendant, that before Answer, no Order could be made, unless the Defendant should think fit to submit the Merits to the Court by Affidavit, and that he had an Option to meet or resist an Application founded upon Affidavit; His Honour the Vice Chancellor decided that there was no Authority for such a Proposition, and that it being unreasonable that the Defendant should retain both the Land, and the Price of the Land, made an Order for Payment of the Money (b). And a Purchaser in Possession, under an Agreement, having exercised Acts of Ownership, *subsequent* to the Discovery of Objections taken to the Plaintiff's Title, has been ordered to pay in his Purchase-Money; and slight Acts of Ownership, committed since the Discovery of the Objections, have been held sufficient (c): it does not seem that the Court has made any positive Distinction between Acts by Purchasers, advantageous or prejudicial to the Property: where the Estate has been deteriorated, that seems to have had some Weight in making the Order (d). But although a Purchaser would not be allowed to keep both the Possession and the Purchase-Money; where he was willing to give up the Possession which he had taken under an Agreement, and it was a Question whether there was *a subsisting Contract*, Lord Eldon refused to order the Purchase-Money to be paid into Court (e). Where two Per-

(a) 1 Meri. 366, 372.

(d) 3 Madd. 219.

(b) 6 Madd. 69.

(e) 2 Meri. 138.

(c) 1 Meri. 133.

sons jointly purchased a Lot under a Decree, the Court would not permit one of them to pay in his Proportion of the Purchase-Money (*a*). Where one Tenant in common had agreed to sell to the other, the Purchaser at the time being in Possession of the whole, with the Approbation of the other, an Application for Payment into Court of the Purchase-Money was refused (*b*). In Sales under a Decree, it is irregular to pay the Money to the Party: it ought to be paid into Court (*c*). If the Vendor resists a Motion by the Purchaser for Payment into Court of the Deposit in the Hands of the Vendor's Agent, he will be charged with the Loss occasioned by the Agent's Failure (*d*).

A Notice of Motion for the Transfer of Stock, and Payment of Money to the Accountant-General, will be found in a subsequent Part of this Work, which see under Title, "*Notices of Motion*;" and Care should be taken in all Notices that every thing the Party moves for should be very fully expressed; the Court will not in general extend the Order beyond what is expressed in the Notice; the Costs of an Application have been refused, because they were not mentioned in the Notice (*e*). The Notice must be served on the Defendant's Clerk in Court; and one clear Day at least must intervene before the Day expressed in the Notice on which the Motion is to be made. Sunday is not accounted a Day within the Time. A Notice served on *Saturday*, is not a sufficient Notice for *Monday*, but would be good for *Tuesday* (*f*). Notice for "*Monday, 12th January, being the First Seal before Hilary Term,*" has been held good Notice for the First Seal, although held on *Thursday, the 15th of January* (*g*). If the Notice should be extended beyond the mere Payment or Transfer, as before mentioned, to any special Matter, it should be

(*a*) 1 Anstr. 22.

(*b*) Coop. 91.

(*c*) Sch. and Lefr. 581.

(*d*) 11 Ves. 144.

(*e*) 18 Ves. 297.

(*f*) 6 Ves. 146.

(*g*) 1 Swanst. 10.

served a sufficient Time; in some Cases a Week, before the Day appointed for Discussion: in a recent Instance (*a*), His Honour the Vice-Chancellor directed a Special Notice of Motion to stand over, so as to give Counsel Time to make himself Master of all the Points in the Cause, and expressed great Dissatisfaction at the Shortness of the Time to which the Course of Practice indiscriminately restricted all Notices, intimating that some Alteration might be made in future. By a late Order of Court, 5th August, 1818, if a Party gives Notice of Motion, and does not move accordingly, he shall, where no Affidavit is filed, pay to the other Side 40*s.* Costs, upon Production of the Notice of Motion; but when an Affidavit is filed by either Party, the Party giving such Notice of Motion, and not moving, shall pay to the other Side Costs to be taxed by the Master, unless the Court itself shall direct, upon Production of the Notice of the Motion, what Sum shall be paid for Costs (*b*). Where the Court is moved for Payment of Costs on account of a Notice which has been abandoned, such Notice of Motion must be mentioned to the Court, and must also be produced to the Register before he draws up the Order for the Costs (*c*). It has also been decided, that these Costs must be paid before the Party to pay them can renew the Motion (*d*). To prevent unnecessary Expence, it may be useful to observe, that a Party not interested in a Motion, who is served with Notice, is entitled to the Costs of appearing, as he ought to be Indemnified for the Expence occasioned by his Prudence in appearing in consequence of the Notice (*e*); but the Costs of a Motion *dismissed* are not Costs in the Cause (*f*). Notices of Motion in *pauper* Causes, must be signed by the Clerk in Court assigned to prosecute or defend for the Pauper (*g*).

(*a*) Webster *v.* Threlfall,
7th February, 1823. MSS.

(*b*) 1 Swanst. 128. 3 Madd.
318.

(*c*) 3 Madd. 437.

(*d*) 3 Madd. 550. 1 Wils.
Ch. 1.

(*e*) 1 Jac. and Walk. 377.

(*f*) 4 Madd. 226.

(*g*) 17 Ves. 387.

In this Place it may be proper to state, that all Services in course, on the Clerk in Court on either Side, of Orders, Notices of Motion, &c., must be on his Copying Clerk, at his Seat in the Six Clerks' Office, or on the Clerk in Court personally within Office Hours, except when the Orders, or any Process, are directed to be served on the Clerk in Court, there *personal* Service is absolutely necessary, but the original Order passed and entered, in every Instance *must be produced and shewn at the Time of Service*, unless the Production of the Original is dispensed with by the opposite Party. Service of the Copy, not producing the original Order at the Time, is irregular, and will not prevent an Attachment (a).

An Affidavit of the Service of the Notice must be made; for the Form of which, see hereafter under Title "Affidavits."

The Affidavit sworn before a *Master in Chancery, for which 1s. is paid in a Cause, or before a Master Extraordinary above twenty Miles from London, 2s. must be filed at the Affidavit Office, in Symonds' Inn, and an Office Copy for use, obtained from thence. In order to save Time, sometimes the Solicitor makes a Copy of the Affidavit on the proper Stamp for an Office Copy; which he may get marked at the Affidavit Office upon paying the Fees, and read in Court on the Motion, if the adverse Party does not appear.

For the Instruction of the Solicitor, it may be observed that when he copies long Affidavits, to save the Time of making Copies at the Affidavit Office, each Sheet of Paper must have a Half Crown Stamp; the first Side to contain

(a) Coop. Ch. Rep. 282. 19 Ves. 380.

* One of the Masters in Ordinary sits at the Public Office in Southampton Buildings, from ten till two, and from six till eight every Day, except in the Long Vacations after the Seals, then from eleven till one only; and the Public Office is not open on a Saturday in the Long Vacation.

nineteen Lines, and every other Side seventeen Lines, six Words in each Line, except the Title of the Cause, and Schedules of Accounts annexed or referred to in such Affidavits, which are to contain four Words in a Line, besides the Column of Figures on the right Hand, and Dates and Times in Figures on the left Hand (*a*). It may be necessary to observe that the Solicitor cannot charge in his Bill of Costs for making this Copy.

A Brief for Counsel should be prepared, stating shortly the Purport and Object of the Bill, and the Admissions of the Defendants from their Answer; a Copy of the Notice of Motion must be annexed, and a handsome Fee given to Counsel, according to the Length of the Brief. On the Day the Motion is to be made, the Solicitor must attend the Court with the Office Copy of the Answer, signed by the Six Clerk (*b*), and an Affidavit of Service of the Notice, and other Papers in the Cause. If the Defendants appear, and oppose the Motion, the Plaintiff's Solicitor may be required to read, from the Office Copy of the Answer, that Part of it, by which the Defendants admit the Money to be standing in their Names, or in their Possession, as stated in the Notice of Motion. When the Motion has been fully heard, the Court will exercise its Discretion, in granting or refusing the Application, or in altering the Terms of it. If the Defendants do not appear, the Court may require the Solicitor to read that Part of the Office Copy of the Answer which shows the Defendants' Admission of the Facts on which the Application is grounded, and which he should be prepared to do; and likewise the Affidavit of Service of the Notice of Motion, or that an Affidavit of Service should be produced to the Register before the Order is delivered out to the Solicitor; but the latter is an Indulgence that the Court is not, at all times, disposed to give.

If an Order should be made, it must be drawn up at the Register Office, in Chancery Lane, by the Register attend-

(*a*) Ord. Can. Bea. Ed. 93, 382. (*b*) 1 Cox's Rep. 437.

ing in Court, when the Order was made ; to enable him to do which, the Solicitor must leave with him the Brief given to Counsel, and such other Instructions as he may require. The Order, when drawn up, should be carefully perused by the Solicitor ; after which it should be passed by the Register, setting his Initials at the Foot on the left Hand, and delivered to the proper Entering Clerk, there to be entered.* A Copy of the Order must be served on the Defendants' Clerk in Court, if the Adverse Party does not appear when the Motion is made, and the original Order left at the Accountant-General's Office ; where the Defendants' Solicitor may apply for the proper Tickets for making the Transfer ; for which Purpose he should take a Copy of the Order from the Register.

If the Motion should be consented to, and the Money be paid into the Bank pursuant to the Notice, the Solicitor giving the Notice, or some other Solicitor for the Parties, should immediately apply to the Accountant-General's Office, and give Directions for Investing the Money in $\text{£}3$. per Cent. Consols. Bank Annuities ; and for this Purpose he must leave the Order for paying in and laying out the Money : the Solicitor should be attentive that the Notice be so framed, and that the Order should be co-extensive with the Notice given : if the latter direction should have been omitted, an Application must be made to the Court, upon Notice, and a Certificate from the Accountant-General of the Money standing in his Name in the Bank, to the Credit of the Cause (*a*) ; and Instructions given to Counsel to move for an Order to lay out and invest the Money, which would be ordered as of course, upon reading the

* All Orders and Decrees, where the first Plaintiff's Name begins with any Letter from A to K, inclusive, are entered at one Seat, in the Register Office ; and where the Plaintiff's Name begins with any Letter from L to Z, inclusive, at another Seat ; over which Seats the Letters A to K, and L to Z, are painted.

(*a*) 1 Atk. 519.

Accountant-General's Certificate, and the Order must be drawn up, passed, and entered at the Register's Office, and left at the Accountant-General's Office, and Directions given for laying out and investing the Money, and a Certificate of the Investment taken from the Accountant-General's Office ; but, in the latter Case, the Neglect in drawing up the Order, omitting the Investment, might furnish a Ground of Objection to the Costs of the Order in the Costs, as between Party and Party, or Attorney and Client.

If the Defendants' neglect to make the Transfer or Payments directed by the Order, within a reasonable Time : to make the Order effective, a Certificate must be obtained from the Accountant-General that the Transfers, or Payment have not been made, which he will give, upon producing the original Order, passed and entered, and the Court must be moved that the Defendants may be ordered to make the Transfers, or Payment, within a limited Time (usually a Week or ten Days.) The Practice of moving to pay in Money *forthwith*, is altered by a General Rule ; a Day must be mentioned in the Order, and if a former Order has been made, and not acted upon, the Court will order Interest from the Day mentioned in the former Order (a). Notice must be given of this Motion ; for which see Title "*Notice of Motion*." And Instructions given to Counsel to Move according to the Notice, and the Motion attended with an Affidavit of Service of the Notice, the Order being drawn up, passed and entered, must be served on the Defendants' Clerk in Court. In order to bring the Defendants into Contempt for a Non-compliance with this Order, a Writ of Execution of the Order must be made out by the Clerk in Court, and served on the Defendants before the Time appointed in the Order for the Transfers, or Payment has elapsed. All Writs of Execution of Orders, or Decrees, are made out by the Clerk in Court, and are to be served on the Party *personally*, by delivering to, and leaving

(a) 8 Ves. 381.

with, him, a true Copy of the Writ of Execution, showing the original Writ under Seal at the Time of Service; and particular Attention should be given that the Service of the Writ be *personal* (a), and within the Time limited by the Order, and so calculated as to afford sufficient Opportunity for the Defendant to make the Transfer, and pay in the Money, before the Time mentioned in the Order has elapsed, allowing for Holidays, and other Impediments in the Course of Business at the Bank; and as all Cases require *personal* Service of an Order to pay in Money, if the Party should abscond, or any Difficulty should arise to impede the Service of the Writ of Execution (b), the Circumstance must be shown by Affidavit, upon an Application to the Court by Motion or Petition for an Order to substitute a Service of the writ upon the Defendant's Clerk in Court, and likewise at the Defendant's Dwelling-house, or Place of Abode with one of the Family (c); and also that the Time in the former Order mentioned for making the Transfer and Payment, should be enlarged to a Period of Time sufficient to allow for the Service of the Writ of Execution, and for the Transfer and Payment as before directed; and although, by the strict Rules of Practice, a Notice of such Motion might not be required, yet, to provide against any Objection, it would be advisable to Serve Notice upon the Defendant's Clerk in Court. To enforce Obedience to the Writ of Execution after regular Service, either upon the Party, or as directed by the Order for substituting the Service, the Plaintiff's Solicitor must search at the Accountant-General's Office to learn if the Transfer has been made, and the Money paid into the Bank; if neither of these has been done, or the one, and not the other, an Affidavit of the Service of the Writ of Execution, and that

(a) 1 Jac. and Walk. 643.

(c) Ord. Canc. Bea. Ed. 169.

(b) 8 Ves. 319. 12 Ves.

Curs. Can. 73. Dick. 166.

202. Prac. Reg. Wy. Ed.

1 Ja. and Walk. 643. Mos.

205, 207.

255. 1 P. Wms. 420.

the Transfer and Payment has not been made, as by the Order directed, must be first made and filed at the Affidavit Office, in Symonds' Inn (a), and an Office Copy taken and left with the Clerk in Court, and Instructions then given to make out an Attachment against the Defendant for Non-performance of the Order, directed to the Sheriff of the County, or Place where the Defendant is resident or dwelling (b): the Attachment must be delivered to the Sheriff, with Instructions to apprehend the Defendant; the Indorsement on the Writ expresses the Purpose for which it issued; and as it is in the Nature of an Execution at Law, the Sheriff cannot take Bail (c): if the Sheriff, after the Caption, permits the Party to go at large, the Court will, upon Application, supported by an Affidavit of the Fact, make an Order upon the Sheriff to pay into Court the Money, for the Non-payment of which the Attachment issued (d): he must detain the Defendant in Custody, until discharged by the Clerk in Court, or Solicitor, or an Order of the Court, or till he is removed either by a Messenger, or *Habeas Corpus*, as the Case may be, but it being only a Contempt of Court, the Sheriff is not entitled to Poundage, as at Law. The Line of Process of Contempt to a Sequestration may be issued, if necessary; but if the Party should be taken upon the Attachment, or other Process of Contempt, the Plaintiff cannot move for a Sequestration upon the Defendant's Removal to the Fleet, until the Return of the Writ (e). There being no Mention made of Costs in the Writ of Execution, if on Service of the Writ, the Transfer is made, and the Money paid in, the Costs are borne by the Party issuing the Process; but if the Defendant be arrested on the Attachment for not obeying the Writ of Execution,

(a) Ord. Can. Bea. Ed. 142.
8 Ves 357.

(b) Ord. Can. Bea. Ed. 61.
199. ant. 112.

(c) Prac. Ch. 331. Gilb.
Rep. 84.

(d) 11 Ves. 170. Bea.
Costs, 139.

(e) 3 P. Wms. 240.

the Costs of the Writ and Attachment must be paid by the Defendant, and insisted on, while he is in Custody, and before he is liberated: And the Rule as to Costs is so obstinate and inflexible, that although the Duty enjoined by the Writ of Execution has been performed, the Claim to the *immediate* Payment of the Costs is lost (a) by discharging the Defendant out of Custody, and cannot be enforced by *Process of Contempt* at any future Time: and they are so far in peril, that as Costs in the Cause, they may be lost altogether (b), as in the Instance of no Costs being given to either Party at the Hearing: in strictness the Solicitor has no Claim upon his Client for the Costs lost by his own Negligence. And Cases may arise where it may be necessary to apply to the Court for a Reference to the Master to Tax the Costs. Where a Defendant is in Custody upon an Attachment for Non-payment of Mortgage-money reported due, a Motion should be made to refer it back to the Master to compute subsequent Interest, and to tax the Costs of the Proceeding to enforce Obedience to the Order, and that Defendant should not be liberated until the Principal, together with the subsequent Interest and Costs were paid (c). For the Purpose of Commitment, under a short Order to pay Money, the Person serving the Order must have a legal Authority to receive the Money, so that the Party may, at the Moment of Service, deliver himself from any further Obligation to the Court: *Lord Eldon* has observed that if the Person serving the Order has Authority to receive it, the other knows to whom he is to pay it; the Person who is to pay, must be placed in such Circumstances, that the Instant he is served with the Order, he may know how to deliver himself from it, and then his Disobedience can be attributed only to his not being ready to pay (d); but though

(a) 3 Madd. 390. 9 Ves.
173.

(b) 1 Madd. Rep. 532.
15 Ves. 174.

(c) 8 Ves. 381.
(d) 19 Ves. 117.

the Party persists, after his Commitment, in refusing Payment, he will not be committed as a close Prisoner within the Walls of the Prison (a).

If the Plaintiff conceives, from any Matter offered by the Defendants, Plea or Answer, that his Bill is not properly adapted to his Case, he may obtain Leave to amend the Bill; the Amendment may be founded upon the Disclosure of Facts in the Answer, or the Discovery of new Matter, since the Bill was filed; but Matter introduced by Amendment must not be that which has happened since the filing of the Bill, and which must be the Subject of a Supplemental Bill; but a Supplemental Bill, merely introducing Supplemental Matter, to sustain the Relief sought by the same Plaintiff from the same Defendant by the original Bill, is not a Supplemental Suit (b): if the Matter of Amendment had come to the Plaintiff's Knowledge, anterior to the filing of the Bill, or is of such a Nature that the Plaintiff might, with due Diligence, have informed himself of it, he would not be entitled to the Costs of the Amendment as Costs in the Cause. If the Bill states a Case which is contradicted by the Answer, and no Evidence can be brought to sustain the Bill, no Relief can be given, although the Defendant, by his Answer, states a new Case, upon which Relief might be given if the Bill had been amended, stating that new Case (c). If the Application to amend the Bill be *before Appearance*, the Plaintiff pays *no Costs* (d): So if, *after Appearance*, and before the Defendant has taken an Office Copy of the Bill; or *after Answer*, requiring no Answer to the Amendment, and amending Defendant's Office Copy, if there be no new Ingrossment of the Bill; and upon the like Terms upon Exceptions to the Defendant's Answer allowed, or Defendant submitting to answer; the Plaintiff may obtain an Order to amend his Bill, and that the Defendant may answer the Exceptions and Amend-

(a) 4 Bro. C. C. 89.

(b) 5 Madd. 428.

(c) 2 Madd. Ch. 369.

(d) 1 Eq. Cas. Abr. 29.

Bea. Costs, 218.

ments at the same Time; but, in the latter Case, the Defendant may avail himself of any Delay in drawing up and serving the Order, by putting in an Answer to the Exceptions, before the Order is served, and discharging the Order, and no further Answer can then be required (*a*). And if Plaintiff should obtain an Order to amend, after Answer, and neglects to do so for three Terms, the Defendant may move to discharge the Order, and to dismiss the Bill at the same Time. It has been decided that an Order neither drawn up nor served, does not prevent a Motion to dismiss for want of Prosecution; but if the Order to dismiss has not been served, before the Bill has been amended, the Court has considered it as a Nullity, and that it is not necessary to move to discharge the Order to dismiss (*b*). If after the Answer has come in, the Defendants are required to put in a *further Answer*, or the Bill should be re-ingrossed, the Order to amend must be upon Payment of 20s. Costs to the Clerk in Court for each Defendant, or each set of Defendants employing a different Solicitor, putting in several Answers. If after the Answer comes in, the Bill is amended by only adding a Defendant, the original Defendant cannot answer the amended Bill, nor obtain an Order for Time to answer (*c*); but there seems to be some Doubt, whether, by amending the Bill, the Defendant is bound by the Offers or Submissions in his Answer (*d*) to the original Bill: and an Amendment, by adding a Defendant, requiring no further Answer, does not prevent Exceptions being taken to the Answer (*e*); but a Defendant has a Right to put in a further Answer *gratis* (*f*). If a Plaintiff excepts to an Answer, and afterwards moves to amend his Bill, that operates as a Waiver of the Exceptions to the Answer; for he may, by the Amendments, strike out the very Passages in respect of which the Answer was excepted

(*a*) 11 Ves. 578. Dick. 296.

2 Cox. 392. 2 Atk. 218.

1 Ves. j. 17.

(*b*) 4 Madd. 176.

(*c*) 3 Anstr. 879.

(*d*) 1 Ves. jun. 210. sed. vid.

6 Ves. 548. et quæ.

(*e*) 9 Ves. 315.

(*f*) 2 Cox, 431.

to: he must apply specially for Leave to amend, without prejudice to the Exceptions previously taken; so after Answer reported insufficient, if Plaintiff amends, he can take no new Exceptions to the Answer to the Original Bill, he may, however, to the further Answer if insufficient; but an Order to amend, pending a Reference, and before a Report, would be discharged with Costs (a).

After a Plea, or Demurrer filed, but *not set down for Argument*, the Plaintiff may obtain an Order, as of course, to amend upon Payment of 20s. Costs; but it must be upon the Terms that the Plea or Demurrer is not set down, which should be stated upon the Application for the Order, and the Amendment will not be an Allowance of the Plea (b). So after an Order for setting down a Plea or Demurrer, the Plaintiff may obtain an Order to amend upon Payment of Costs of the Order for setting it down; and if a Plea or Demurrer be set down, the Plaintiff may obtain an Order to amend upon Payment of 20s. Costs, and £5. in addition to the 20s.; and if, in this Stage, the usual Order to amend upon Payment of 20s. Costs, should be obtained, unless the Plaintiff will consent to pay £5. for setting down the Plea, the Order will be discharged with Costs for Irregularity (c); and if the Plaintiff, when the Plea comes on to be heard, declines arguing it, stating his Intention to amend the Bill, which he is at liberty to do, the usual Words, “upon Hearing and Debate,” must not, in this Case, be inserted in the Order (d). After a Demurrer to the whole Bill has been allowed, an Amendment has been permitted, but this seems not to have been strictly regular: if the Ground of Demurrer may be removed by Amendment: it seems most proper to make a special Order, adapted to the Circumstances of the Case (e). The Plaintiff may,

(a) 4 Madd. 396. 12 Ves. (c) Dick. 358. Prac. Reg.
458. 2 Sch. and Lefr. 515. Wy. Ed. 68. 9 Ves. 221.
2 Swanst. 255. (d) 3 Madd. 183.

(b) 1 Ves. 448. Dick. 441. (e) 2 P. Wms. 300. Dick.
3 Madd. 183. 67. Red. Tr. Ch. 13.

after Replication, obtain an Order to withdraw his Replication, and amend his Bill, upon Payment of 20s. Costs, which is of course without amending (*a*). But if the Amendment be by only adding a Party, it may be ordered without withdrawing the Replication (*b*): And so after Subpœna to rejoin, or Rules to produce Witnesses, but Notice of the Application must be given, and a special Case made (*c*); and also after Examination of Witnesses, and even after Publication has passed, (but, in the latter Cases, there is no Instance of a Plaintiff obtaining an Order to amend, without withdrawing the Replication;) and after Publication the Amendment can be only by adding Parties, which may be done at any Time before the Hearing (*d*), and the Plaintiffs may, under such an Order, introduce Facts consequential upon such an Amendment (*e*). And even after the Cause is set down for Hearing, the Court will give Leave to amend by adding Parties; but the Cause as to them must be heard upon Bill and Answer only, for no new Charge can be introduced of a material Fact, which was not before stated, unless in the Case of an Infant (*f*); but a Supplemental Bill may be filed (*g*). And at the Hearing, a Cause has been allowed to stand over for Want of Parties, with liberty to amend by adding Parties, upon Payment of the Costs of the Day (*h*), which, by ancient Practice, is £5. in Court, and £3. 6s. 8d. at the Rolls; but if the Defendant does not, by his Answer, state the Want of Parties, he is not entitled to the Costs of the Day (*i*). Where the Plaintiff amended, without requiring a further Answer, but did not call upon Defendant for the Office Copy to make the Alterations, according to the usual Practice, yet Defendant being apprized of it, and permitting

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| (<i>a</i>) 3 Ves. and Bea. 20. | (<i>g</i>) 3 Atk. 110. 370. |
| (<i>b</i>) Dick. 768. | (<i>h</i>) 1 Atk. 289. 2 Atk. 14. |
| (<i>c</i>) 4 Madd. 212. 6 Madd. 106. | Dick. 498. Ord. Can. Bea. Ed. 289. 1 Cox, 437. |
| (<i>d</i>) 1 Atk. 51. 3 Atk. 370. | (<i>i</i>) 3 Madd. 61. 2 Atk. 14, |
| (<i>e</i>) 12 Ves. 48. | 109. <i>sed quæ</i> . |
| (<i>f</i>) Ambl. 149. | |

the Cause to come on to a Hearing, and in Possession of the Evidence on the other Side, the Court refused to allow Time to object to the Irregularity (*a*).

Where a Matter has not been put in issue by the Bill with sufficient Precision, the Court has, upon hearing the Cause, given the Plaintiff Leave to amend the Bill, for the Purpose of making the necessary Alteration (*b*): although a Cause is allowed to stand over to add a Party, against whom, in a plain Case, a Decree would be made, yet the Court will not allow of an Amendment in order to enable a Party to make a *new Case* (*c*). If an Irregularity arises in any Alteration of the Bill by way of Amendment, it may be taken advantage of by Demurrer, or Plea, as in the Instance of a Plaintiff amending his Bill, stating Matter arisen subsequent to the filing the Bill: the Subject of a Supplemental Bill, or a Bill of Revivor, it is demurrable (*d*). A clerical Error has been amended even after a Cause is brought on to be heard: where, in a Bill filed by some Parishioners, the usual Words, “*on behalf of themselves, and all other the Parishioners, &c.*” were, by Mistake omitted, and an Objection being taken on that Ground, the *Lord Chancellor* thought he might allow the Amendment, even in that Stage of the Cause (*e*). And an Amendment has been allowed by striking out the Names of several Plaintiffs, and Part of the Prayer, between the Hearing of the Cause and giving Judgment (*f*). And after a Decree, an Amendment by making an Administrator Party, has been permitted, namely, that he might be a Witness to what was done (*g*). A mere Bill of Discovery cannot be amended by adding Parties (*h*), and it should seem that after an Answer to a Bill of Discovery merely, an Application as of course to amend the Bill,

(*a*) 1 Ja. and Walk. 210.

(*b*) 2 Bro. P. C. 194.

(*c*) 2 Sch. and Lefr. 11.

(*d*) Red. Tr. Ch. 169.

1 Atk. 291. sed. vid. 1 Madd.

Rep. 572.

(*e*) 14 Ves. 6i.

(*f*) 12 Ves. 66, 174.

(*g*) 1 Ves. 69.

(*h*) 2 Meri. 74.

by adding a *Prayer for Relief*, was refused with Costs; the Court, however, seemed to intimate, that upon a special Application, it might be granted; but that it would be better to direct the Plaintiff to pay the Costs, and to file a new Bill, and make use of the Discovery in the first Answer, as an Answer to a Bill of Discovery, as Evidence; not as Part of the Defence or Admission upon which the Bill proceeds (a): if, however, the Defendant answers such amended Bill, the Court, it seems, will entertain the Suit (b). So, if the Matter of Amendment has arisen subsequent to the filing of the Bill, and is properly the Subject of a Supplemental Bill, if the Defendant answers the amended Bill, it is too late to object to the Irregularity at the Hearing (c). After a Motion to dismiss the Bill, and an Undertaking to speed the Cause, the Plaintiff will not be allowed as of course, to move for Leave to amend, or to withdraw the Replication, and amend; the Application must be *special* upon Notice (d). If the Evidence of a co-Plaintiff is required, and the Defendant will not consent to his Examination, the Court, on Motion and Notice given, will give Leave to amend, upon Payment of, or Security for Costs of so much of the Bill as is occasioned by making him Plaintiff, and striking out his Name as co-Plaintiff and making him a Defendant, amending the Defendant's Copy of the Bill, and requiring no further Answer (e). So, if the Amendment be by striking out the Name of a Defendant, after Appearance or Answer, it must be upon Payment of taxed Costs. A *Pauper* is not allowed to amend his Bill, by leaving out some of the Defendants, but upon Payment of Costs (f). Where a Plaintiff, under the common Order to amend upon Payment of 20s. Costs, introduced very long

(a) 15 Ves. 358, 365. 2 Ves. and Bea. 113.

(b) 3 Atk. 303.

(c) Red. Tr. Ch. 169.

(d) 4 Madd. 268. 1 Cox, 397.

(e) 1 Ves. jun. 142. 6 Ves. 145. 11 Ves. 563. 12 Ves. 493.

(f) 2 Bro. C. C. 272.

Amendments, he was ordered to pay £8. additional Costs (a). And in one Instance, upon a fifth Amendment, *Lord Hardwicke* ordered the Plaintiff to pay £7. additional Costs (b) over and above the 20s.; and his Lordship would have directed additional Costs to be paid on a third Order, if it had not been obtained on Terms, and with the express Consent of the Defendant (c): and his Lordship stated, that the Rule which fixes the Costs at 20s. for the ordinary Costs of Amendment of a Bill, to have been first established in order to prevent the Inconvenience of entering largely into the Merits of the Cause, before the proper Time for hearing the Merits (d); but *Lord Hardwicke*, though he frequently departed from it, never, by any general Rule, altered the Practice. *Lord Thurlow* refused to order taxed Costs after three extensive Amendments, observing that a Case of Oppression must be made out; that a mere Statement of the Number of Sheets in the several amended Bills was not sufficient to break through the general Rule (e). Where the Plaintiff under the common Order to amend, on Payment of 20s. Costs, entirely changed the Nature of a Bill, by converting a Prayer for an Account, against a Bailiff or Agent, to a Bill to foreclose a Mortgage, after an Issue directed, finding the Plaintiff a Mortgagee; the Court gave the Defendant the taxed Costs of the Issue and of the Application, and all the Costs beyond those of an original Bill of Foreclosure, but refused to take the amended Bill off the File, because set down for hearing (f). In a cross Cause by Amendment of the original Bill in a material Point, the Plaintiff loses the Priority of Suit (g).

The Plaintiff's Solicitor should observe, that if the Defendant has not previously come under the Terms of enter-

(a) Dick. 58, 110.

(e) 2 Bro. C. C. 289.

(b) Dick. 184. Beam. Costs. 220.

(f) Coop. Ch. Rep. 141. Dick. 110. Belt's. Suppl. 88.

(c) 2 Atk. 123.

(g) 2 Cox, 371. 2 P. Wms.

(d) 1 Atk. 396.

485. 2 Atk. 218. 3 Atk. 723.

ing an Appearance with the Register, and consenting to a Serjeant at Arms, &c., imposed by the Standing Order of Court of the 23d January, 1794, he is entitled as of course to one Order for Time to answer an amended Bill, and the like on Exceptions allowed (*a*).

The Defendant has eight Days exclusive, if the Record is amended and delivered over, after Service of the Order, to put in a further Answer to the Amendments; and the Plaintiff cannot reply to Defendant's Answer, till eight Days have elapsed (*b*).

An Order to amend may be obtained by a Petition to the Master of the Rolls, which is the most expeditious, or by Motion to the Court. In Term Time, or at the Seals, this may be done by Motion, and is granted of course, except as after mentioned. A Motion Paper must be given to the Counsel who settled the Bill, and he, having made the Motion in Court, the Register will draw up and pass the Order, on the Motion Paper being left with him. The Order must be entered, which, on all Orders contained on one Side of the Paper only, is done by leaving a Copy thereof with the Entering Clerk, at the Register Office, who will mark the Order, and it must be served on the Defendant's Clerk in Court. When the Order to amend is obtained upon Petition to the Master of the Rolls, which is the only Mode of Application in the Vacation after the Seals, and is, at all Times, the least inconvenient and most expeditious; a Petition must be prepared, the Form of which will be found under Title "*Petition*," and engrossed upon the proper Stamp, and it must be varied according to circumstances, if none of the Defendants have answered it should be so stated; or if some have answered, and others have not, and no further Answer is required from those who have answered, the Prayer of the Petition must be framed according to the Fact. The Petition must be left at the Secretary's Office, in the Rolls' Yard, and 5*s.* 6*d.* paid for

(*a*) 17 Ves. 113.

(*b*) 2 Cox, 431.

answering and must be then left at Mr. Bird's Seat, in the Register Office, and 6s. paid for drawing up and passing the Order with him, and 6d. paid for entering the Order there. On all Services of Orders, the original Order passed and entered must be shown to the Clerk in Court, or to his Copying Clerk, or Agent, at his Seat in the Six Clerks Office, on whom it is served, and a true Copy of the Order left.*

The necessary Amendments having been made in the Draught of the Bill, (which is usually done in red Ink that the Alterations may be seen the more readily) the Draught of the Bill so amended (together with the Order to amend the Bill) must be left with the Clerk in Court, who will make the Record of the Bill conformable thereto, and will call for the Defendant's Office Copy, and Defendant *must* bring his Office Copy to be amended, the Plaintiff is *not bound to procure it*; but if regularly brought, and not amended, through Plaintiff's Neglect before hearing, *the Court will not hear the Cause (a)*, where the Order to amend directs the Office Copy to be amended. In all Cases where the Amendments do not exceed two Chancery Folios (180 Words) in any one Place, a new Engrossment will not be required; but if the Amendments are more extensive, or the Bill has been so often amended, that the Amendments to be inserted, although under two Folios, cannot be interlined upon the Record, or are so considerable as to blot and deface the Record, it should be taken off the File, and a new Record put upon it (b): the amended Bill must be engrossed on Parchment with a Five Shilling Stamp, and annexed to the original Bill, and as the original and amended Bill form but one Record (c), the amended Bill must be directed to the same Lord Chancellor, Lord Keeper, or Lords Commissioners to whom the original Bill

* For the Order, see Hand's Chan. 75, 76, 77, 82, 83.

(a) 2 Cox's Rep. 431.

(b) 13 Ves. 86.

(c) 1 Ves. jun. 210, 250.

Dick. 108, 199.

was directed. At the Time of leaving the new Engrossment, the Clerk in Court should be informed that it is an amended Bill, and the Order to amend the Bill left at the same time, without which the amended Bill cannot be filed, and if filed as an original Bill, much Difficulty would be experienced in rectifying the Mistake. Where the Defendants are required to put in an Answer to the Amendments, and likewise where a new Engrossment from the length of the Amendments is rendered necessary, and the Defendant is obliged to take an Office Copy, the Order directs the Plaintiff to pay 20s. Costs to the Clerk in Court for each Defendant or Set of Defendants, or if the Clerk in Court be employed for two or more Solicitors, then to such Clerk in Court 20s. for each Defendant employing a different Solicitor, except in the Cases where the Defendant submits to answer Exceptions; and where the Answer is reported insufficient: there the Order directs the Defendants to answer the Amendments and Exceptions at the same Time; and in strict Practice the Costs of Amendment should be paid before the Record of the Bill is amended: if a full Answer has been put in to the original Bill, and afterwards the Plaintiff amends his Bill, and requires a further Answer, His Honour the Vice-Chancellor has decided that a fresh Subpoena, to appear to and answer such amended Bill must be served; and the Practice is so settled (*a*). Of the Mode of proceeding on Exceptions, see hereafter.

TRINITY VACATION.

If new Parties, Defendants, are added to the Suit by the Amendments, who reside * in London, or within ten Miles of that City, an Order for a Subpoena, returnable

(*a*) Pennington v. Mulcaster, Michas. 1817. MSS.

* For the Order, see Hand's Ch. 1.

immediately, may be obtained on application to the Master of the Rolls, by Petition, or by Motion to the Court in Term Time, or at the General Seals after Term: this is necessary in the Vacation only, as, in Term, the Subpoena may be made returnable on any Day. The Form of the Petition for that Purpose, is given under the Head "*Petitions*," which see hereafter: and the Form of the Affidavit necessary to be made in support of the Application, whether by Petition or Motion, will be also found under Title "*Affidavits*."

The Petition and Affidavit must both be left with the Secretary to the Master of the Rolls. The Petition being answered, a Fee of 5s. 6d. must be paid for answering, and the Petition left at the *Register Office, and the Order drawn up, and 6s. paid, and for entering 6d., but previously the Affidavit must be filed at the Affidavit Office, and a Certificate thereof taken to the Clerk at the Register Office, who draws up the Order, and shewn to him before he will deliver out the Order. Filing Affidavit is 2s. And the Order passed and entered, and a Præcipe for the Subpoena must be left at the Subpoena Office; if sealed at a private Seal, 3s. 6d. extra is paid; but if it should be necessary to open the Seal for that Purpose, a Fee of two Guineas extra must be paid. It is not necessary to file another Warrant to prosecute: on showing the Order to amend the Bill to the Clerk at the Subpoena Office, he will not require another Warrant to prosecute.

The Defendant must appear in four Days after the Service of a Subpoena returnable immediately: and his Time for answering will expire in eight Days exclusive after his Appearance; but he will be entitled to the usual Order for Time to be obtained as before-mentioned; Process of Contempt may be issued to enforce an Appearance and An-

* All Orders of Course on Petitions presented to the Master of the Rolls, are drawn up by Mr. Bird, at his Seat in the Register Office.

swer, as in ordinary Cases, but in general the Amendment of a Bill puts an end to all Process of Contempt, previously issued, for want of Answer: the Court refused to allow a Plaintiff to amend without Prejudice to a Sequestration, notwithstanding an Undertaking not to require any Answer to the Amendments (a).

MICHAELMAS TERM, 1820.

A Suit imperfect in its frame, or become so by Accident, before its end has been obtained, may, in many cases, be rendered perfect by a new Bill, which is not considered as an original Bill, but merely as an Addition to, or Continuance of, the former Bill, or both: of this kind is a *Bill of Revivor*, which is a Continuance of the original Bill, when, by Death, some Party to it, has become incapable of prosecuting or defending a Suit; or a Female Plaintiff has, by Marriage, incapacitated herself from Suing alone (b). If a Suit abates by the Death of a Party, whose Interest is thereby transmitted to his Heir, or personal Representative, and no Title is in dispute, in the Court of Chancery, but the Person alone in whom the Title is vested, is to be ascertained; the Proceedings may be continued by Bill of Revivor *merely*. So, on the Marriage of a Female Plaintiff, if no Act is done to affect the Rights of the Party, but the Marriage, no Title can be disputed; the Person of the Husband is the sole Fact to be ascertained; a Bill of Revivor *merely* is sufficient (d); but if a Suit abates, and by any Act, besides the Event by which the Abatement happens, the Rights of the Parties are affected, as a Settlement or Devise, though a Bill of Revivor merely might enable the Parties to prosecute the Suit, yet to bring the whole Matter before the Court, the Parties must, by Supplemental

(a) 2 Cox, 411.

(b) Red. Tr. Ch. 27.

(c) Red. Tr. Ch. 53.

(d) Coop. Pl. 61.

Bill added to, and made part of, the Bill of Revivor, show the Settlement or Devise, or other Act affecting their Rights. And so, if any other Event, which occasions an Abatement, is accompanied or followed by Matter necessary to be stated, beyond what is merely necessary to show by or against whom the Suit is to be revived, it must be set forth by way of Supplemental Bill added to the Bill of Revivor, and thence termed a *Bill of Revivor and Supplement*, being compounded of both those two species of Bills (a). If, by the Death of a Party, whose Interest is not determined, but is attended with such a Transmission, that the Title to it, as also the Person entitled, may be litigated in Chancery, as in the case of a Devise of real Estate (b), a Bill of Revivor does not lie; *an original Bill, in the nature of a Bill of Revivor*, must be filed, which will have so far the Effect of a Bill of Revivor, that if the Title of the Representative, substituted by the deceased Party, be established, the same Benefit may be had of the Proceedings upon the former Bill as if the Suit had been continued by Bill of Revivor (c). Nor can a Suit be continued by Bill of *Revivor merely*, where the Interest of a Party, suing or defending in his own Right, wholly determines, and becomes vested in another, not claiming under him; as in the Instance of a Succession to a Benefice, or to a Remainder after the death of a Tenant for Life; nor can the Defect be supplied by Supplemental Bill; *an original Bill, in the nature of a Supplemental Bill*, must be filed (d): but to this latter a new Defence may be made, and the Pleadings and Depositions cannot be used, as if taken in the same Cause, and a Decree, if any has been made, has no other Advantage than as an

(a) Red. Tr. Ch. 55, 63. Vern. 548, 672. Eq. Ca. Cowp. Pl. 64. Madd. Ch. 326. Abr. 83.

13 Ves. 161.

(d) 9 Ves. 37. Com. Rep.

(b) 1 Ch. Ca. 123, 174. 589. 2 Bro. P. C. 320, 454. 3 Ch. Rep. 39 Mos. 44. Red. Tr. Ch. 51, 56.

(c) Red. Tr. Ch. 55. 2

Inducement to make a similar Decree (*a*): Where a Suit abates by the Death of the Plaintiff, a Person claiming by Provision, or *per formam doné*, and not as Heir or Representative of the deceased Plaintiff, cannot revive, but must bring an original Bill, or proceed at Law (*b*). In all these Cases, if the Suit has become abated, as well as defective, the Bill is commonly termed a Supplemental Bill, in the nature of a Bill of Revivor, as it has the Effect of a Bill of Revivor in continuing the Suit (*c*). It has been laid down by a respectable Writer on the Practice of the Court, that a Plaintiff, on the Death of a Defendant, is not obliged to bring a Bill of Revivor; he may file a new Bill, if he thinks he can make a better Case than by the first Bill (*d*).

As the Interest of the Plaintiff generally extends to the whole Suit, therefore, in general, upon *the Death of a Plaintiff*, or *Marriage of a Female Plaintiff*, all Proceedings become abated (*e*). If, however, her Husband die, *before* Revivor, her Incapacity to prosecute the Suit is removed, although the subsequent Proceedings are in the Name and Description which she has acquired by the Marriage; but where a Female Plaintiff marries, *pendente lite*, and the Cause proceeds as a feme sole Plaintiff, the mere Want of a Bill of Revivor is not sufficient ground to reverse the Decree (*f*): where the Marriage of a Female Plaintiff, after Answer to a Bill of Discovery, abates the Suit, it cannot be revived for Costs (*g*). Upon the *Death of a Defendant*, all Proceedings abate as to that Defendant; but upon the *Marriage of a Female Defendant*, the Proceedings do not *abate*, though her Husband ought to be named in the sub-

(*a*) 9 Ves. 37, 67. 2 Madd. Ch. 529.

(*b*) 6 Bro. P. C. 20. 2 Eq. Ca. Abr. 3, 4. 4 Vin. Abr. 432.

(*c*) Red. Tr. Ch. 53.

(*d*) 1 Vern. 463. 3 Atk. 486. 2 Madd. Ch. 529.

(*e*) Red. Tr. Ch. 45.

(*f*) Red. Tr. Ch. 47. Cowp.

Pl. 67. 1 Ch. Rep. 123.

2 Term Rep. 169. Nels. Rep.

85. Dick. 8. 5 Madd. 449.

(*g*) Dick, 13. 133. 10 Ves. 31.

sequent Proceedings, and he must join in the Answer of the Wife for conformity (*a*); for no Married Woman can put in an Answer separate from her Husband, without an Order for that Purpose (*b*). If a Man marry an Administratrix, and a Decree be obtained against her and her Husband, in respect of the Assets, and the Wife dies, the Suit is abated, and the Plaintiff must revive against the Administrator of the Wife (*c*); but the Death of the Husband will not abate a Suit when the Husband and Wife sue, or are sued, in right of the Wife, and the Husband die under circumstances which admit of no demand by, or against, his Representatives. Where a Suit is for a Legacy against Baron and Feme, the latter Executrix of the Testator, the Death of the Baron does not abate the Suit (*d*): if, upon the Death of the Husband of a Female Plaintiff, suing in her Right, the Widow does not proceed in the Cause, the Bill is considered as abated, and she is not liable to the Costs; but she may proceed without a Bill of Revivor, and have all the benefit of the Proceedings; but any Step in the Suit subjects her to the Costs, *ab initio* (*e*); nor does the Death of a Party, whose Interest in the subject matter of the Suit determines by his Death, or survives to another Person, Party to the Suit, cause an Abatement (*f*); as in the Instance of the Death of a Tenant for Life, his Interest is thereby determined: but if any Account should be required against his Representatives, they must be made Parties. So the Death of a Party, having a joint Interest, surviving to another Party, as joint Trustee, or joint Executor, will not abate the Suit (*g*): the same Rule holds as to Creditors suing on behalf of themselves and other Creditors; the Persons re-

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| (<i>a</i>) 1 Ves. 182. Toth. 13. | (<i>d</i>) 3 Atk. 725. 2 Vern. |
| 1 Vern. 318. For. Rom. 174. | 249. 3 P. Wms. 496. |
| (<i>b</i>) Red. Tr. Ch. c. 3. | (<i>e</i>) Red. Tr. Ch. 47. |
| Coop. 64. | (<i>f</i>) Coop. Tr. 65. |
| (<i>c</i>) 2 Vern. 195. Beam. | (<i>g</i>) 2 Ch. Rep. 69. |
| Pleas, 283. | |

maining before the Court, either have in them the whole Interest in litigation, or are competent to call upon the Court for its Decree (*a*): the Representatives of the deceased Plaintiff may come in under the Decree in common with the other Creditors; and a Creditor coming in before the Master, on a Creditor's Bill, may revive; but some Doubt seems to have been entertained as to a Suit by some Creditors in respect of their *several* Demands, and not on behalf of *all* the Creditors in general (*b*). And upon the same principle, if two *joint Tenants* exhibit their Bill, and one die or release, such Death or Release will not abate the Suit as to the other Plaintiff (*c*); but it is otherwise in the Case of several *Tenants in common*, Plaintiffs, if one dies, the Suit abates, for a Right descends to their Representatives, who may revive, and must be before the Court at the Hearing (*d*); yet, where two Tenants in common filed a Bill, and one died, *Lord Eldon* decided, after great Consideration, that although the Representative of the co-Plaintiff might revive, without making the other a co-Plaintiff, that if he did so, he must make him a Defendant (*e*). The Death of a Plaintiff, after a Decree in an Interpleading Bill, does not occasion an Abatement of the Suit; the Cause may proceed without reviving (*f*). The Death or Outlawry of a *Relator* does not abate the Suit; but the Court will restrain further Proceedings till another *Relator* is named (*g*). Where a perpetual Injunction has been obtained, it is not necessary upon an Abatement to revive, merely to keep the Injunction on foot (*h*).

(*a*) Red. Tr. Ch. 56. 3 Ch. Rep. 66. 1 Meri. 364. 1 Eq. Ca. Abr. 3. 364.

(*b*) 1 Meri. 361. 5 Madd. 423. (*e*) 11 Ves. 306, 313.

(*c*) 2 Freem. 6. Coop. Ca. Abr. 2, 80. Red. Tr. Tr. 65. Hard. 168. 11 Ves. Ch. 47.

306. 1 Meri. 364. (*g*) 1 Swanst. 305.

(*d*) 1 Eq. Ca. Abr. 1. (*h*) Dick. 351, 471.

A distinguished Writer has observed, that whether Bankruptcy is an *Abatement* or not, the Court has considered the Suit, in such Cases, to be as defective as if it were abated; and that a Bankrupt Plaintiff must, by some kind of Bill, bring his Assignees before the Court, or suffer a Dismissal of the Bill, though generally without Costs (*a*). Where a Plaintiff became Bankrupt, after Replication, the Court made an Order that the Assignees should file a Supplemental Bill, in the nature of a Bill of Revivor, within a Fortnight, or that the Bill should be dismissed (*b*). And, in a recent Instance, the Bankruptcy of a Defendant, or Executor, after a Decree to account, has been considered in the nature of an Abatement, or at least has required a *Supplemental Bill, in the nature of a Bill of Revivor*, to be filed (*c*). Privity of Title between the Party reviving, and the Person in whose place he would stand, has been considered essential to entitle the former to revive (*d*). An Administrator, *de bonis non*, cannot file a Bill of Revivor *merely* to revive a Suit, instituted by a former Administrator (*e*); nor the Committee of a Lunatic become so since the Bill filed (*f*); nor a Purchaser, *pendente lite* (*g*); nor a Devisee (*h*); nor Assignees either of an Insolvent, or of a Bankrupt coming in under former Assignees (*i*): an Original Bill, in the nature of a Bill of Revivor, must be filed, and the like Proceedings carried on as on a Bill of Revivor, and no new Defence is permitted (*k*). There can in gene-

(a) Beam. Pleas, 291.

18 Ves. 424. Rose, 196.

(b) 5 Madd. 80.

(c) 1 Ves. and Bea. 426.

(d) Red. Tr. Ch. 77.
2 Vern. 548. 1 Atk. 88.(e) 2 Vern. 239. Coop.
Tr. 68. Mos. 44. Red. Tr.
Ch. 56.

Vol. I.

(f) Coop. Tr. 76, 210.

(g) 2 Freem. 132. 1 Atk. 89.

(h) 1 Ch. Ca. 174. Sel. Ch.
Ca. 53.(i) Com. Rep. 589. 1 Atk.
88, 218. Coop. Tr. 69.(k) Sel. Ca. Ch. 53. Madd.
Ch. 532. 1 Vern. 548. 2
Vern. 672.

ral be no *Revivor* of a Suit against a Party's Representatives for Costs *merely* (*a*), unless they have been taxed, and a Report made in the Life-time of the Party (*b*); or where they are to be paid out of a real Estate (*c*), or other particular Fund (*d*); or have been decreed against an Executor out of Assets (*e*). Where any thing remains executory in the Decree, besides Costs, a Revivor has been allowed, though the Costs have not been taxed (*f*). In a recent Case, the Court seems to have inclined to a Distinction between an Abatement by the Death of the Party to pay, and the Death of the Party to receive, the Costs; that, in the former Case, they died with the Debtor; but that, in the latter, the Representative of the Creditor, might revive for Costs *merely*, on the Death of the Plaintiff; though before the Report, and not to come out of a particular Fund (*g*). An Inrollment of the Decree is not usual nor necessary to entitle the Representative of a Party to revive for Costs (*h*); if a Party be in Execution for Costs, the Court will make an Order upon the Representative to revive within a certain Time, or that the Defendant should be discharged (*i*).

Lord Hardwicke held, that a Defendant could not revive, but in one Instance, viz. after a Decree to account (*k*), in which case both Parties are Actors, and either may revive (*l*).

(*a*) 2 Ch. Rep. 101, 106. (*f*) 2 Ves. 579. 3 Atk. 812. 2 Ves. sen. 465, 580. 3 Atk. 812. Red. Tr. Ch. 164. 2 Ves. sen. 465. Bunb. 160.

(*b*) Dick. 14, 62, 173, 649. (*g*) 2 Ves. j. 313. 3 Ves. 195. Beam. Pleas. 298. 1 Bro. C. C. 438. Coop. Pl. 68. Gilb. For. Rom. 181. (*h*) 2 Meri. 116. 2 Ves. 461. (*i*) 2 Ves. sen. 461. 3 Ves. 197.

(*c*) 3 Atk. 772. 3 Ves. 195. 10 Ves. 572. (*k*) 3 Atk. 691. Madd. Chan. 532.

(*d*) 3 Atk. 812. 2 Meri. 116. (*l*) 2 Vern. 219, 296. 1 P. Wms. 263, 743.

(*e*) 2 Ves. sen. 465. 3 Atk. 772. 2 Madd. Ch. 531.

From subsequent Decisions, however, it seems, that a Defendant, or his Representative, may revive a Suit in every Case, where he or they can derive a Benefit from the further Proceedings (*a*); but a Party applying to revive, must have an Interest in the further Prosecution of the Suit. In an Injunction Cause, where the Object of the Defendant applying to revive appeared to be merely for the Purpose of dissolving an Injunction, and to proceed at Law, the Court refused the Application (*b*). A Defendant, after Answer to a Bill of Revivor, has been allowed to revive and carry on the Suit, where a Plaintiff, after a Decree, has neglected to obtain the usual Order to revive (*c*).

It may be useful here to remark, that if a Bill of Revivor be filed without sufficient Cause to revive the Suit, and this be not apparent on the Face of the Bill, the Defendant may plead the Matter necessary to shew, that the Plaintiff is not entitled to revive the Suit (*d*). So if the Bill of Revivor does not show a sufficient Ground for reviving the Suit, or any Part of it, either by or against whom it is brought, the Defendant may, by Demurrer, show Cause against the revival (*e*). And if a Person, entitled to revive a Suit, should not proceed in due Time, a Plea of the Statute of Limitations may be pleaded to his Bill of Revivor, afterwards filed (*f*), unless there has been a Decree to account, when a Bill of Revivor is considered in the nature of a *scire facias*, and not within the Statute of Limitations (*g*); and if there are not proper Parties to the Suit

(*a*) Pre. Ch. 197. Sel. Ca. 1 Eq. Ca. Abr. 4. Pl. 11.
Ch. 54. 3 Ves. 195. 10 Ves. Red. Tr. Ch. 59.

406. 12 Ves. 317. 1 Eq. (*e*) Red. Tr. Ch. 164.

Ca. Abr. 2. (*f*) Red. Tr. Ch. 221, 234.

(*b*) 12 Ves. 311. Coop. Tr. 302. sed vid. Cary 8,

(*c*) Dick. 283. 1 Meri. and Dick. 601.

Rep. 154. (*g*) 1 P. Wms. 742, 767.

(*d*) 1 P. Wms. 752. 3 P. 2 Sch. and Lefr. 632. 1 Ball
Wms. 348. Com. Rep. 590. and Beatt. 531. 2 Ves. j. 86.

as it stands on the Bill of Revivor, that Circumstance, it would seem, may be pleaded to such Bill (*a*): in like manner, if the Plaintiff is not entitled to revive the Suit, though a Title be stated in the Bill, so that the Defendant cannot Demur, a Plea may be resorted to (*b*). And if the Bill be a Bill of Revivor merely, in a Case requiring a Bill of Revivor and Supplement, or a Supplemental Bill only, it would appear that the Defendant may plead such Supplemental Matter (*c*); but it has been held, that a Defendant cannot to a Bill of Revivor put in a Plea which has been pleaded by the original Defendant, and over-ruled (*d*): a Defendant, however, has been allowed to put in a new Plea in bar, to a *scire facias* to revive the Decree (*e*). It should seem that if a Defendant dies after the Hearing of the Cause, and before Judgment, it is not necessary to revive before Judgment is given (*f*). And where the Plaintiff, in a Bill of Revivor, omitted to make one of the Defendants a Party, it was held as no Ground for a re-Hearing; the Proceedings having been carried on in such Defendant's Name. So where a *Feme covert* has sued as sole to a Decree, the Husband has been allowed to proceed as if Party to the Record (*g*).

A Suit entirely abated, may be revived as to Part only, or as to Part by one Bill, and as to the other Part by another Bill, where the Rights of the Plaintiff are vested, Part in his Real, and Part in his Personal Representatives (*h*).

A Bill of Revivor must state the Original Bill, the several Proceedings, and show a Title to revive, and charge that the Cause ought to be revived, and stand in the same Condition, with respect to the Parties in the Bill of Revivor, as it was in with respect to the Parties to the Original Bill, at the Time the Abatement happened, and pray that

(*a*) 11 Ves. 313. Coop.
Tr. 302.

(*b*) Red. Tr. Ch. 234.

(*c*) 13 Ves. 161, 483. Coop.
Tr. 308.

(*d*) 3 Bro. C. C. 70.

(*e*) Dick. 34.

(*f*) 9 Ves. 461.

(*g*) Chan. Rep. 252. 5

Madd. 449.

(*h*) Red. Tr. Ch. 68. Coop.

Pl. 71. 1 Eq. Ca. Abr. 3, 4.

the Suit may be revived accordingly; and if an Admission of Assets, or an Account be required, that Defendant may admit Assets or set forth an Account (a). If the Defendant to the Original Bill die before Answer, or after an Answer excepted to, or after Amendments made in the Bill, and no Answer put in, the Bill must pray an Answer to the Original Bill, and to the Exceptions or Amendments remaining unanswered, or both. If the Plaintiffs, or those standing in their Right, after a Decree, neglect to revive, the Defendant may file a Bill of Revivor, but in such Case, the Bill merely substantiates the Suit, and brings before the Court the Parties necessary to see to the Execution of the Decree, and to be the Object of its Operations, rather than to litigate the Claims in the Original Pleadings, except so far as they remain undecided (b). But for the best and fullest Information, the junior Practisers must consult the Work of the noble and learned Judge, and other learned Writers before referred to (c).

The Death of a Plaintiff is supposed to occasion the Necessity of a Bill of Revivor in the Suit.

The Bill of Revivor may be prepared by the Solicitor, and the Draught perused and signed by Counsel; but the Observations before made upon the Original Bill, apply with so much force and propriety, to every subsequent Pleading, that it seems to be more advisable to lay Instructions, accompanied by the Original Bill, and other Pleadings, before the junior Counsel who prepared or perused and signed the Original Bill, with a handsome Fee, suitable to the Trouble and Difficulty he may be supposed to have, in preparing and settling the Bill.

The Bill must be fairly transcribed upon Parchment with a five Shilling Stamp upon each Skin, and the Counsel's Name written at the Foot of the last Skin: for further

(a) Red. Tr. Ch. 59, 60.
2 Madd. Ch. 534.

(b) Red. Tr. Ch. 62.

(c) Madd. Ch. Beame's
Pleas and Costs. Cowper's
Treatise on Pleading.

Information the Directions before given for preparing and ingrossing the Original Bill will be found sufficient. The Bill ingrossed must be delivered to the Plaintiff's Clerk in Court, in the Six Clerks' Office, to be filed; and a *Præcipe* for a *Subpæna*, must be left at the *Subpæna* Office in the Rolls-Yard, in the following Form:

“ Subpæna John Stevens the Elder, to appear in
 “ Chancery, returnable the 28th Day of Novem-
 “ ber, instant, to revive and answer at the Suit of
 “ John Lawrence and others, Plaintiffs.”

Duncombe, 6th Nov. 1820.

The Instruction before given for Service of this *Subpæna* must be followed in the present Instance, and the *Appearance* of the Defendant within the Time limited in a Town or Country Cause, as the Case may be, must be enforced by the ordinary Course of Process of Contempt, attending in all Cases of Service of Process to the filing the Affidavit of Service, &c. previous to the Issuing. The Defendant has of course eight Days after his *Appearance* to put in his Answer, or to show Cause by Plea or Demurrer against reviving the Cause; but as an Answer to a *mere* Bill of Revivor is not, in all Cases required, the Plaintiff's Solicitor, at the Expiration of the eight Days after Defendant's *Appearance*, if no Plea or Demurrer be filed, or Order for Time served, must apply to the Court by Motion, as of course, for an Order, that “ *the Cause may stand revived, the Defendant's Time for answering being out,*” which the Court will make, though Defendant insists, by his *Answer*, that the Plaintiff is not entitled to revive; for this, it should seem, ought to be shown by Plea or Demurrer; a Defendant, by his Answer to a Bill of Revivor, is not to contest the Justice of a Decree, but only to show Cause against it (a). The Order must be drawn up, passed and entered at the Register Office, and served as usual upon the adverse Clerk in Court, and left with the Plaintiff's

(a) Dick. 20. 1 Eq. Ca. Abr. 3. 2 Freem. 548.

Clerk in Court; but if an Order to dismiss has been obtained after an Abatement, although irregular, it is not to be regarded as a nullity, the Order must be discharged before the Plaintiff can obtain an Order to revive (*a*). And if it should appear at the Hearing that the Plaintiff had no Title to revive, he cannot have a Decree (*b*); but it appears to be unnecessary to revive against a Defendant who has not answered (*c*).

In an Injunction Cause, if the Suit abates by the Death of the Plaintiff, the obtaining an Order *nisi* by the Defendant to revive, or to dissolve the Injunction, which is of course, obliges an immediate Revival of the Suit (*d*).

If the Defendant has appeared and answered the Original Bill, if he cannot be found to be served with the *Subpœna to revive and answer*, it should seem that the Plaintiff must proceed under the *Stat. 5 Geo. 2. c. 25*, to have the Bill taken *pro Confesso* (*e*); but although the Defendant has appeared to and answered the Original Bill, the Court will not make an Order that Service of the *Subpœna to revive and answer* on the Defendant's Clerk in Court in the original Cause, should be good Service upon the Defendant (*f*). It seems to be undecided whether a Defendant to the Original Bill, who has run out the usual Orders for Time to answer, is entitled over again to obtain the usual Course of Orders for Time to answer a Bill of Revivor (*g*). Notwithstanding an Abatement by Death, the Court, sometimes by *Consent* of all Parties *interested*, will order collateral Matters to be done, as the Delivery of Deeds, &c., or Payment of Money out of the Bank, &c. But this seems to be restricted to Cases where the Court must deliver itself

(*a*) 1 Meri. 361.

(*e*) 2 Br. Ch. C. 127. Dick.

(*b*) 3 P. Wms. 348. Red. 63.

Tr. Ch. 234.

(*f*) Dick. 545, 6. 2 Cox,

(*c*) 1 Vern. 308.

389.

(*d*) Sel. Ca. Ch. 24. 1 Cox

(*g*) 11 Ves. 306.

Rep. 50, 411.

from the Custody thereof some Way or other, and proceeds *ex officio* (a).

If the Plaintiff should be advised that the Defendant's Answer admits the Plaintiff's Case, or sufficient to enable the Plaintiff to hear the Cause without the Examination of Witnesses (b), he may set down the Cause for *hearing upon Bill and Answer only*; but in such Case the whole of the Answer is admitted in all Points as true (c), and therefore it would be advisable previously, to lay a State of the Case, and the Pleadings, &c., before some senior Counsel, for his Advice and Opinion thereon.

If the Defendant's Answer is full and sufficient, and the Bill requires no Amendment to put the Facts in issue, the Plaintiff must file a *Replication*, which is the Plaintiff's Answer or Reply to the Defendant's Plea or Answer, and is merely a general Denial of the Truth of the Plea or Answer, and of the Sufficiency of the Matter therein alleged, to bar the Plaintiff's Suit; and an Assertion of the Truth and Sufficiency of the Bill (d). Formerly Replications were General or Special (e); the latter were occasioned by the Introduction of new Matter in the Plea or Answer; but the unnecessary Length of Pleading it gave rise to, induced the Necessity of altering the Practice, and Special Replications are now out of use (f): Amendments of the Bill have been substituted, and the Plaintiff must be relieved according to the Form of the Bill, in its original or amended State: but a distinguished Writer has observed, that if a Plaintiff is disposed to controvert a Part of a Case made by an Answer, and to admit the Rest, he may still put in a Replication so far Special, that it is confined to the

(a) 2 Ves. 400. 1 Ves.
185, 6. Eq. Ca. Abr. 2.

(b) Prac. Reg. Wy. Ed.
374.

(c) Toth. 55. Ord. Can.
Bea. Ed. 180. 2 Atk. 377.

(d) Red. Tr. Ch. 259.
Coop. Tr. 328.

(e) Harg. J. Arg. 508.

(f) Red. Tr. Ch. 260.

1 Vern. 354.

particular Matter controverted, instead of being a general Denial of the Truth of the whole Answer, and then Defendant is put to the Proof only of the Matter replied to (*a*). Where there is a Plea and Answer, and the Plaintiff replies, the Replication must be to both Plea and Answer; a Reply to the Plea only, would be irregular (*b*); or if the Defendant rests his Defence upon a Plea only, the Plaintiff may put the Facts pleaded in issue, by a Replication (*c*): not so, if the Defendant disclaims *generally*; there, if the Plaintiff replies, it would be at the Risk of Costs; but not if the Disclaimer be to Part, and a Plea and Answer to the Residue (*d*). Where a Supplemental Bill is not a Supplemental Suit, but only introduces Supplemental Matter to sustain Relief by the same Plaintiff from the same Defendant, the whole Record is one Cause, and a General Replication applies to the whole Record, and not merely to the Original Bill (*e*). Where a Notice to dismiss for Want of Prosecution, had been given, and before the Motion came on, a Replication had been filed, the Court held the Replication to be regular, but allowed the Defendant the Costs of the Motion (*f*). If a Plaintiff replies to an Answer, and without Rejoinder or Rules to produce Witnesses, brings the Cause to a Hearing, the Answer will be taken as true; the Defendant being deprived of the Opportunity of going into Proof (*g*); and although the Plaintiff needs no Witness on his Part, it may, in some Cases, be necessary to reply, and put the Defendant on Proof of some Part of his Answer, as where the Answer admits an Allegation, and sets up some further Matter in bar of Plaintiff's Equity (*h*). The Plaintiff, after Replication, must serve Defendant with

(*a*) Red. Tr. Ch. 260.

(*e*) 5 Madd. 427.

(*b*) 2 Vern. 46. 2 Madd. Ch. 350.

(*f*) 4 Madd. 39.

(*c*) Dick. 510.

(*g*) 2 Cha. Ca. 21.

(*h*) Prax. Alm. 14.

(*d*) 3 Atk. 581. Prac. Reg. Wy. Ed. 374.

a Subpoena to rejoin, unless he will appear *gratis*, which puts the Cause completely at issue between the Parties. A *Rejoinder* is never filed. Immediately after Defendant's Appearance to rejoin *gratis*, or after the Return of the Subpoena, the Parties may proceed to the Examination of their Witnesses in support of the Facts alleged in the Pleadings on each Side (*a*). Wherever Witnesses are to be examined in chief, a Replication must be filed: so it has been said to be the Course of Practice where an Infant is a Party, who, as his Answer cannot be read against him, can admit nothing; that the Plaintiff, therefore, must prove his Case (*b*); but upon an Application to discharge an Order obtained by an Infant Plaintiff to withdraw his Replication upon Payment of twenty Shillings Costs, this Rule as to an Infant was disputed; and *Lord Eldon* observed, that it had been said, that in the Case of an Infant Plaintiff, there must be a Replication, but that he never could find it laid down in any Book of Practice: and that a Plaintiff may of course apply to withdraw his Replication upon Payment of twenty Shillings Costs, without amending, and refused to discharge the Order (*c*). It should seem that a Plaintiff may apply to withdraw his Replication, and amend the Bill, as of course, unless some further Proceeding has been taken in the Cause, or the Plaintiff has undertaken to speed the Cause: where Rules had been given to produce Witnesses, and an Application was made to withdraw the Replication, and the Rules to produce Witnesses, and for Leave to amend the Bill, the Court held that the Motion required Notice, and a Special Case to support it (*d*). The Court will not permit a Plaintiff to withdraw the Replication, unless it be added for the Purpose of Amendment; and in some Instances, the Court has expected the Plaintiff

(*a*) Mos. 296.

(*c*) 3 Ves. and Bea. 20.

(*b*) 2 Madd. Chanc. 275.

(*d*) 4 Madd. 212.

2 Atk. 377. 1 P. Wms. 237.

note.

to shew the Materiality of the Amendment, and why the Matter of Amendment was not stated before (*a*). But there are Instances where Liberty has been given to amend without withdrawing the Replication (*b*). If Witnesses have been examined, and by a Mistake, a Replication has not been filed, the Court has permitted a Replication to be filed, *nunc pro tunc* (*c*). And for the Purpose of giving Notice under the *Stat. 49 Geo. 3. c. 121. s. 11.*, to dispute an Act of Bankruptcy, and petitioning Creditor's Debt, after Witnesses have been examined, the Court has made an Order to withdraw the Rejoinder, and rejoin *de novo*; but being an Act of Indulgence, the Court requires an Affidavit of Surprise or Accident, and that it will be essential to the Justice of the Case, and upon the Terms of admitting particular Facts in Evidence, and the Payment of such Costs as the Court shall direct.*

A Replication filed on the Day a Motion was made to dismiss the Bill, has been held regular; and whether it was filed after the Motion to dismiss, or before, is immaterial, there being no Fraction of a Day, the Costs of the Motion were refused (*d*): but a Replication, filed after an Order to dismiss, though before Service of the Order, will not prevent the Effect of the Order, which operates from the Time of its being pronounced; but the Practice not being previously settled, the Bill was restored on Terms, and Payment of Costs (*e*).

(*a*) 3 Atk. 565. 1 Ves. j.
476. 7 Ves. 130. 3 Anstr.
807. 2 Madd. Ch. 276.

(*c*) Mos. 296.

(*d*) 5 Madd. 60.

(*e*) 1 Ja. and Walk. 284.

(*b*) 2 Dick. 768.

* 1 Ves. and Bea. 221. 1 Coop. Ch. Rep. 270. 1 Meri. Rep. 4., and the Cases there cited, by which it appears that the Commission of Bankruptcy and Proceedings are not *conclusive Evidence* of the Act of Bankruptcy, but subject to be controverted like any other Evidence, and so decided in the Courts of King's Bench and Exchequer.

Replications are not settled or signed by Counsel, and there may be Instances, as a learned Writer has observed, where Causes have been heard, and no Issue has been joined between the Parties (*a*). The Replication is a printed Form of Words upon a five Shilling stamped Parchment, which the Clerk in Court prepares, and fills up with the Names of the Parties to the Suit, the Term, and the Year. A Special Replication requires the Signature of Counsel.

The Plaintiff is entitled as of course till the end of the third Term, after the coming in of Defendant's Answer, to file a Replication, exclusive of the Term in which the Replication is filed, and until the Bill is actually dismissed a Replication may be filed; upon Notice given to dismiss, the Plaintiff may avail himself of the Interval, and file a Replication before the Motion comes on, but he would be subject to the Costs of the Motion (*b*). The Plaintiff's Solicitor gives Instructions to his Clerk in Court to file a Replication to Defendant's Plea and Answer, or both; and in strict Practice the Replication should be filed before the Issuing, or at least before the Return of the Subpoena to rejoin, at the peril of Taxed Costs, and the Loss of the Writ (*c*). After the Replication is filed, the next Step is to serve Subpoenas to rejoin; the Cause is not till then at issue, and the Parties may, immediately after Appearance to rejoin, proceed to the Examination of Witnesses. Subpoenas to Rejoin, returnable on a Day in Term, may be obtained by leaving a Præcipe at the Subpoena Office, without any Application to the Court; but in that Case they must be served on the Defendants in the same Manner as the Subpoena to appear and Answer; but in order to save Trouble and Time, it is now in every Case usual to apply for an Order by (*d*) Petition to the Master of the Rolls, for Leave to sue out Subpoenas to rejoin, returnable immediately, and that Service thereof on the Defend-

(*a*) Coop. Ch. Pl. 331.

(*b*) 4 Madd. 39.

(*c*) Ord. Can. Bea. Ed. 106.

(*d*) Ibid. 185.

ant's Clerk in Court may be deemed good Service on the Defendants, or sometimes the Order is obtained by Motion to the Court, which is of course. If there are any Witnesses, who reside in the Country, to be examined, it is usual to add to the Motion, or Petition, a Request for Permission "to sue out a Commission for the Examination of Witnesses, returnable without Delay, and that the Defendant's Clerk in Court may, in four Days after Notice, join, and strike Commissioners' Names, or in Default thereof, that the Plaintiffs may have a Commission directed to their own Commissioners, with Liberty to execute the same in Term Time;" all which is granted of course. The Order must be drawn up, passed, and entered, at the Register Office, and the Subpœnas obtained from the Subpœna Office, which will be made out there on the Production of the Order, and a Præcipe left in the following Form :

" Subpœna for George Wilson, William Johnson
 " and Stephen Lawrence, to rejoin, at the Suit
 " of John Lawrence and others, returnable im-
 " mediately.

" Kensit, Solicitor, 15th November, 1820."

The same Rules apply to this Subpœna, with respect to the Number of Defendants, &c., as to the Subpœna to appear and answer. The Order and Subpœnas must be served on the Defendants' Clerk in Court;* and if a †

* Service on his Copying Clerk, at his Seat in the Six Clerks' Office is sufficient, showing the original Order.

† The Practice now universally acquiesced in is, not to issue a Commission for the Examination of Witnesses in the Country at a less Distance than twenty Miles from London, and certainly the Travelling and other Expences of Witnesses to London from a much greater Distance than twenty Miles, will be less than the Expence of executing a Commission in the Country.—But on the Point of Practice, see Ord. Can. Bea. Ed. 193, where ten Miles,

Commission for the Examination of Witnesses in the Country is to be issued, it must be made out by the Clerk in Court, and Instructions must be given to him with Commissioners' Names, usually four, on the Part of the Plaintiffs, with Directions to let such two of the Commissioners' Names stand as the Plaintiff wishes, and to strike out two of the Defendants' Commissioners' Names, which is called *striking Commissioners' Names*.

The Cause being now at Issue, all Parties proceed to examine Witnesses in support of their Case, stated in the Pleadings: the Plaintiff must prepare Instructions for Interrogatories for the Examination of his own Witnesses, and for the Cross-Examination of such of the Defendants' Witnesses as may be deemed necessary. The Interrogatories should be prepared and settled by Counsel, and for the Examination of Witnesses in Town, filed in the Examiner's Office, in the Rolls Yard.

If a Will of Real Estate is to be proved in the Cause, the original Will must be obtained from the Commons, or other Ecclesiastical Court; for which an Application must be made at the Prerogative Office, if proved there, and a Clerk will be directed to attend with it at the Examiner's, and will take it back to the Prerogative Office when the Examiner has no farther Occasion for it.

But considering the great Importance of Evidence, it would be more advisable for the junior Practisers to prepare

is stated as the Distance from London within which no Commission for the Examination of Witnesses shall be executed; but *Lord Eldon* has observed, that it is impossible for the Court, in many Instances, to support its present Practice, upon the Notion, that a continued Practice does not nullify a written Order, that much of modern Practice would be found inconsistent with subsisting Orders: and upon Principle, repeated Decisions forming a Series of Practice, as it must be, against an Order, may with safety be taken to amount to a Reversal of that Order. 1 Ves. and Bea. 327.

Instructions, and, with the Pleadings in the Cause, to lay them before the Counsel who signed the Bill, to consider upon the Proof necessary to be adduced on the Part of the Plaintiff, and the Points upon which to cross-examine Defendants' Witnesses, and to let him prepare and settle Interrogatories for that Purpose. The Draft of the Interrogatories must be signed by Counsel (*a*), and very fairly and correctly transcribed, upon a five Shilling stamped Parchment, and the Counsel's Name set thereto, and for the Examination of Witnesses *in Court*, which comprehends all Witnesses residing in London, or within twenty Miles (*b*): the Interrogatories must be left with one of the Examiners, at the Examiner's Office, in the Rolls Yard, Chancery-lane, which is termed *filing Interrogatories*; but if any Witnesses are to be examined by Commission, the Plaintiff should file with the Examiner such Interrogatories only as apply to Witnesses residing within the District of the Examiner's Office. The Examiner should be fully instructed as to the Points in the Cause, on which the respective Witnesses are to be examined, and a Time appointed with him for the Examination. Each Witness attending to be examined, must be taken by a Clerk from the Examiner's Office to the Public Office to be sworn to the Interrogatories by the sitting Master there, or out of Office Hours, by any other Master in Chancery, a *Jurat*, stating the Name of the Witness, the Day and Year, &c., when produced and sworn, is made in the Margin of the Interrogatories, and signed by the Master; but before the Witness is sworn thereto, the Examiner's Clerk must show the Witness at the Seat of the adverse Clerk in Court in the Six Clerks' Office, and at the same Time leave a Notice in Writing of the *Name and Place of Dwelling* (*c*) of the Witness, to prevent Witnesses being personated, and to give an Opportunity for Cross-Examination, which the

(*a*) Ord. Can. Bea. Ed. 273,
312.

(*b*) Dick. 231.

(*c*) Ord. Can. Bea. Ed. 185.

Clerk in Court sends to his Client; and if the adverse Party should be advised to cross-examine such Witness, he should instruct his Examiner, and file Interrogatories for that Purpose. It should seem that the Party producing the Witness is obliged to procure him to remain or return to be cross-examined; but this must be done while he is under Examination; for if the Witness has completed his Examination, pending which no Proceedings have been taken to cross-examine, the adverse Party *takes upon himself* to get the Witnesses examined. Where a Plaintiff's Witness secreted himself before he was cross-examined, the Court ordered the Plaintiff to procure the Attendance of such Witness, or the Deposition to be suppressed (a).

If a Witness refuses to attend to be examined, a Subpoena must be taken out and served on him personally; the Præcipe for which is as follows:

“ Subpoena for William Lax, to appear in Chancery,
 “ returnable immediately, to testify on the Behalf
 “ of John Lawrence and Others.

“ Kensit, 19th November, 1820.”

Three Witnesses only can be inserted in one Subpoena. Husband and Wife are considered as several Witnesses, and the Christian and Surname of the Wife must be inserted in the Præcipe and in the Writ. The Subpoena must be served *personally* upon each Witness, and also a Subpoena-notice in Writing, usually signed by the Examiner, of the Time and Place of Examination; and it is usual to give or tender to the Witness a small pecuniary Compensation if he resides within the Bills of Mortality, and is summoned to give Evidence within them; in the Courts of Law only one Shilling; if the Witness be a Married Woman, Service must be upon her *personally*, and the Tender of Expences to her, and not to her Husband: if the Witness resides in the Country, his reasonable Expences for coming up to Town to be examined, for returning back, and his reason-

(a) Dick. 288. Ord. Can. Bea. Ed. 482.

able stay to be examined, must be paid or tendered, without which, if he appears, he is not bound to give Evidence. A very learned Writer (*a*) has observed, that with respect to *Compensation for Loss of Time*, the general Rule is, that it ought not to be allowed; Medical Men and Attornies seem to form an Exception.

The Notice may be in the following Form:

“ In Chancery.

“ Mr. William Lax,

“ Take Notice that by virtue of a Writ of Subpœna issuing out of, and under the Seal of the High Court of Chancery, to you directed and herewith served, you are hereby required to appear personally, before *T. H. Plumer*, Esq., one of the Examiners of the said Court, on Monday the 24th Day of November, instant, by ten of the Clock in the Forenoon of the same Day, at the Examiner's Office, in the Rolls-Yard, Chancery Lane, in the County of Middlesex, to testify the Truth according to your Knowledge, in a certain Cause, now depending between *John Lawrence* and others, Plaintiffs, and *George Wilson* and others, Defendants, on the Behalf of the said *John Lawrence*, and others. Dated 21st Day of November, 1820.

“ To William Lax.

“ T. H. Plumer, Examiner.”

The Subpœna and Notice must be served *personally* on the Witness, a reasonable Time, two Days at least before the Time appointed for his Examination. If he then refuses to attend, a Certificate must be taken from the Examiner that the Interrogatories are filed, and that the Witness has not attended to be examined: and an Affidavit must be made and filed of the personal Service of the Subpœna and Notice; and an Office Copy obtained from the Affidavit Office, and Instructions given to Counsel to move,

(*a*) Phillips's Evid. Vol. I. p. 4, 5, 7. Mau. and Sel. 156. 159. 1 Brod. and Bin. 515.

that the Witness may be ordered to attend the Examiner, and the Court will make an Order for the Attendance of the Witness, at his own Expence, to be sworn and examined, in four Days; or that he shall stand committed to the Fleet Prison. The Order being drawn up, passed, and entered, must be served *personally* on the Witness. If he still refuses to attend to be examined, a Certificate of the Default must be obtained from the Examiner, and an Affidavit of the personal Service of the Order and Notice on the Witness made and filed, and an Office Copy taken, and an Application made thereon, with the Certificate, to the Court, that the Witness may stand absolutely committed to the Fleet Prison, which will be ordered of course. The Order being drawn up, passed, and entered, must be delivered, with Instructions, to the Tipstaff, or to the Warden of the Fleet, who will obtain a Warrant thereon from the Lord Chancellor's Secretary, and will apprehend the Witness under the Authority of the Warrant, where he must remain in custody until he has been fully examined on the Interrogatories, paid the Costs of Contempt, and until the Court make an Order for his Discharge, which he may obtain upon producing a Certificate from the Examiner of his having attended and completed his Examination, and also a Consent by the Clerk in Court, showing that the Costs of Contempt are paid or satisfied; either by Motion in Court, or by a Petition to the Master of the Rolls.* The same Method is used, to compel the Attendance of a Witness who refuses to be sworn, or who has been sworn, and afterwards refuses to attend the Examiner to finish his Exami-

* The Consent is merely to show, that the Costs of Contempt are satisfied, and is not necessary if the Court can be satisfied in any other Manner. If the Order directs that the Payment or Tender of the Costs should be verified by Affidavit, the Order, accompanied by such Affidavit, is imperative upon the Gaoler, and he is obliged to discharge the Party: his Disobedience would be a Contempt. 1 Madd. Rep. 109.

nation; and, likewise, where he has been examined, but refuses to sign his Deposition (a).

A Witness confined in Prison may be examined there; for which Purpose, within twenty Miles of London, a Master in Chancery, together with the Examiner, will attend him in Prison, with the Interrogatories, which must be previously filed at the Examiner's Office, to which the Witness must be sworn in the usual Manner. The Examiner should be appointed two or three Days before the Time of taking the Examination; and a two Days' Notice thereof in Writing, must be served upon the Clerk in Court for the adverse Party, naming the Witness and Place of Confinement, in order that he may cross-examine him, if he is so advised. A Witness within the like Distance, incapable of attending from Sickness or Infirmary, may obtain an Order to be examined at his Residence (b). These Instructions, however, apply only to the Case where the Witness is within twenty Miles of London; if at a greater Distance, a Commission to examine Witnesses must be issued to take the Deposition of the Witness there; the Witness cannot be sworn before a Master Extraordinary in any Case.

Where a Deed, a Will, or other Document necessary to be proved on the part of the Plaintiff, or of any other Party in the Cause, is admitted by a Defendant's Answer, to be in his *Custody or Possession*, and he refuses to leave it with the Examiner to be proved in the Cause, an Application by Motion must be made to the Court for an Order upon the Defendant to produce and leave it with the Examiner (c). A Notice in Writing, two Days previous to the Motion, must be served upon the Defendant's Clerk in Court; and in support of the Motion, the Admission of the Fact from the Office Copy of Defendant's Answer will be sufficient to obtain the Order, which must be drawn up, passed, and

(a) 12 Ves. 201.

3 P. Wms. 364. 4 Ves. 66.

(b) 4 Madd. 463.

15 Ves. 408. 1 Swanst. 7.

(c) 2 P. Wms. 176. 409. 535.

entered at the Register Office, and served upon the Defendant's Clerk in Court: and in adverse Cases an Affidavit of Service of the Notice will be required, or at least produced to the Register before he delivers out the Order. To make this Proceeding effective, the Original Order must be left with the Plaintiff's Clerk in Court, and a Writ of Execution of the Order made out by him, which must be served *personally* upon the Defendant, by delivering to, and leaving with him a correct Copy of the Writ, and shewing the Original Writ, under Seal, at the Time of Service. Upon Defendant's Neglect or Refusal, an Affidavit of the *personal* Service of the Writ must be made and filed, and a Certificate from the Examiner of the Default left with the Clerk in Court, with Instructions to make out an Attachment, which must be delivered to the Sheriff to be carried into Effect, and to which there can be no Bail: or as it should seem, the Motion may be for an Attachment against the Defendant for his Contempt in not obeying the Order for Production supported by an Affidavit of the Fact (*a*). It may be useful to remark, that unless the Deeds, or other Documents, are *admitted or appear* by Defendant's Answer to be in his Possession or Power, though the Fact of Defendant having the Custody may be collected by inference, and sufficiently manifest from the Answer, and the Admission shown by Affidavit to that Effect; the Court will not make any Order for Production, nor allow the Fact to be proved by Affidavit (*b*); but Leave will be given to amend the Bill for the Purpose of obtaining the Admission, though the Cause may be at issue (*c*); but if Defendant seeks a Production of Deeds, &c., in the Plaintiff's Possession, he cannot obtain an Order for that Purpose; he must file a Cross-Bill (*d*).

If a Person, not Party to the Cause, has a Deed or Docu-

(*a*) 1 Swanst. 536.

(*d*) 3 Meri. 292. 18 Ves.

(*b*) 19 Ves. 144. 14 Ves. 211. 484. Dick. 778.

(*c*) 1 Ja. and Walk. 227.

4 Madd. 391.

ment in his Possession, which is required to be given in Evidence, a *Subpœna duces tecum* must be obtained, and served personally on the Witness: an Attorney cannot be compelled but by the same Process (a).

The Præcipe will be in the following Form:

“ Subpœna for Francis Arnold to appear in Chancery,
 “ returnable immediately, to testify on the Behalf of
 “ John Lawrence, and others; and to bring with
 “ him and produce a certain Indenture of Settle-
 “ ment, bearing Date the 10th Day of May, 1795,
 “ and made between [*describe the Deed*] in his Cus-
 “ tody.

“ Gregg, Solicitor, 19th November, 1820.”

The Writ of *Subpœna duces tecum* is of compulsory obligation on a Witness to produce Papers thereby demanded, which he has in his Possession, and which he has no lawful or reasonable Excuse for withholding, of the Validity of which Excuse the Court, and not the Witness, is to judge (b); the Discretion of the Judge will guard the Interests of third Persons (c). An Action lies against a Party who refuses to produce a Paper in his actual Possession, though the legal Custody may belong to another, and although the Papers may be got at by other Means (d). And an Attorney may be compelled to produce his Client's Lease, where such Production will not operate to his Prejudice, and the Client would have been compelled; but the Court will satisfy itself that no such Consequence is likely to ensue before it will permit the Instrument to be used (e): Under a *Subpœna duces tecum*, the Party may, in Court, object to produce the Documents; but if the Objection is over-ruled, the Court will compel the Production; and the Witness ought to have them ready to be produced, in obedience to the judicial Mandate (f).

(a) 6 Madd. 29.

(e) 1 Stark. 95. 1 Meri. 114.

(b) 9 East. Rep. 473.

(f) 1 Swanst. 209. 1 Phil-

(c) Holt. Rep. 239.

lips's Ev. 2.

(d) 1 Campb. 14, 180.

6 Esp. 116. Holt. 239.

If it should be necessary to examine a Defendant for the Plaintiff, which is often the case, where he is a Witness to the Execution of any Deed or Instrument stated in the Proceedings, &c. &c., an Order must be obtained upon Petition at the Rolls; and though it may be done by Motion in Court, the former is the easier and more expeditious. This is granted upon the Terms of saving just Exceptions, and payment of Costs; and is so much of course, that where a Defendant claimed a material Interest in the Suit by his Answer, and the Plaintiff had obtained the usual Order to examine, the Court refused to discharge the Order, observing that the Question how far Defendant was a competent Witness must be raised at the Hearing, when the Deposition is offered to be read in Evidence (*a*).

The Order being drawn up, passed, and entered, and served upon the adverse Clerk in Court, must be left with the Examiner; he will, upon the Authority of the Order, examine the Defendant, for without an Order to examine Defendant, his Deposition could not be read; if taken, it would be irregular, and a Surprise upon the other Side (*b*). But it may be useful to observe, that a Defendant examined under the usual Order as a Witness, may have a Decree against him, upon other Matters to which he was not examined (*c*). If the Answer of a Defendant is replied to, he cannot be examined without withdrawing the Replication (*d*). So where Defendant examines Witnesses, it will be considered that he is concerned in Interest, unless done collusively (*e*). And if Defendant should be examined to Matters in which he is interested, he may demur. A Plaintiff should well consider, that by examining a Defendant as a Witness, he precludes himself from obtaining any Relief by Decree against him; and if from the Nature

(*a*) 2 Cox's Rep. 413. 2
Ves. and Bea. 405. 1 Ja. and
Wa. 197.

(*b*) 2 Ball and Beat. 413.

(*c*) Ambl. 583.

(*d*) Dick. 559.

(*e*) 2 Ves. 224.

(*f*) Ambl. 583.

of the Case that Defendant would be *primarily* liable, and another Defendant only in a *secondary* Degree, the Plaintiff loses his Remedy altogether (a).

A Plaintiff may, *without Consent of Defendant*, apply to strike the Name of a Co-plaintiff, whom he wishes to examine, out of the Bill upon giving Security for Costs (b). Or a Plaintiff may obtain an Order to withdraw the Replication, and amend the Bill, by striking out the Name of a Co-Plaintiff, and making him a Defendant for the Purpose of examining him as a Witness, upon the Payment of the *taxed* Costs, of making him a Co-Plaintiff, and amending Defendant's Office Copy of Bill, requiring no further Answer, *without the Consent of the Defendant* (c). And it should seem, that where a Replication has been filed, the Plaintiff cannot, in strictness, obtain an Order without withdrawing the Replication (d): but it has been decided that a Defendant cannot examine an *involuntary* Plaintiff as a Witness, unless the Plaintiff will consent to be examined: if he consents, the Court will make an Order for his Examination, saving just Exceptions, leaving the Question, whether his Deposition should be read, to be made at the Hearing (e). If, however, an Interest should appear when an Order is applied for, the Court will not make the Order (f). A Co-Plaintiff has been allowed, by Consent, to be examined to prove a Deed, where he has been the only surviving Witness (g); *previous to a Decree* one Defendant may obtain as of course a like Order to examine a Co-Defendant, saving just Exceptions, where he has been made such for Form-sake (h), or is not interested (i), as in the Instance of Guardian *ad litem*, (k) or a mere Trustee, or dis-

(a) 1 Cox's Rep. 344. 3 Dow. 153.

(b) 6 Ves. 145. 12 Ves. 493. 11 Ves. 563.

(c) 1 Ves. j. 142.

(d) Dick. 595. 2 Fowl. Exch. 100.

(e) 15 Ves. 179. Ambl. 393. 1 P.Wms. 596. Dick. 382.

(f) 18 Ves. 517. 1 Vern. 227.

(g) 1 Dick. 650. Pre. Ch. 411.

(h) 2 Atk. 229.

(i) 2 Ves. 222.

(k) Dick. 781.

claims (*a*), or not interested in the Matter to which he is to be examined, and no Decree sought against him (*b*); and where he has been probably made a Defendant merely to deprive another of his Testimony (*c*). Wherever a Decree is sought against a Defendant, he cannot be examined (*d*). After a Decree, a Special Ground must be laid to examine a Defendant (*e*). If the Evidence of a *prochein ami*, or Wife of a *prochein ami*, of an Infant Plaintiff should be required, an Order may be obtained, upon Payment of Costs, to strike his Name out of the Bill, and by Amendment to substitute that of another responsible Person (*f*). Where a Person had been examined as a Witness for the Plaintiff, and had afterwards been made a Defendant, and was not interested in the Suit, or in the Costs, an Objection that no Order had been made to examine him, was over-ruled, and his Evidence was allowed to be read (*g*). It has been laid down in a respectable Work upon the Practice of the Court, that if both Sides examine a Witness without an Order, neither can Object to the Evidence; each, by examining him, hath allowed him to be a good Witness (*h*); but the Cross-examination of a Witness does not amount to a Waiver of the Objection to his Competence (*i*).

For the Examination of a Witness who does not understand English, an Order must be obtained by Motion or Petition to the Rolls, as of course, to appoint a Person by Name, usually a Notary Public, to Interpret the Interrogatories to the Witness, and to translate his Answers into English: the Order drawn up, passed, and entered, must be taken to the Examiner, with whom the Interrogatories

(*a*) 2 Chan. Ca. 214.

(*b*) 2 Ves. and Bea. 406.

(*c*) 1 Bell and Beatt. 99.
16 Ves. 219. 1 P. Wms. 596.
3 P. Wms. 288.

(*d*) 13 Ves. 456.

(*e*) 16 Ves. 218.

(*f*) Red. Tr. Ch. 21. 3

Atk. 511. Stran. 708.

(*g*) 2 Ja. and Wa. 538.
sed. vid. Prac. Reg. 120. contr.

(*h*) Prac. Reg. Wy. Ed. 419.

(*i*) 19 Ves. 453. Cyop. 300.
1 Vern. 254. Gwill. 1250.

are filed, who will attend with the Interrogatories, and the Interpreter to be sworn before the Master at the Public Office as directed by the Order. And the Examiner will also make an Appointment for the Attendance of the Interpreter and Witness to be examined, and the Deposition of the Witness should, at the same Time, be translated by the Interpreter, and taken down by the Examiner in the English Language (*a*). If the Deposition should be taken in a Foreign Language, an Order must, in like Manner, be obtained, appointing a Person to translate the Deposition into English, and the Translation engrossed upon proper Stamps, must be annexed to the Record of the Depositions, and verified upon the Oath of the Person appointed to make the Translation, and an Office Copy made, which, upon producing the Order, will be received in Evidence: the Court will, in no Case, make an Order to take the original Deposition out of the Office for the Purpose of translation (*b*).

By the standing Orders of the Court (*c*), “ The Examiner is to examine the Witness to the Interrogatories *seriatim*, and not to permit him to read over, or hear read, any other Interrogatory, until that in hand be fully finished, much less is he to suffer the Deponent to have the Interrogatories, and pen his own Depositions, or depart after he hath heard an Interrogatory read over, until he hath perfected his Examination thereto. And to take care to hold the Witness to the Point interrogated, and not to run into Extravagancies and Matter not pertinent to the Question; nor use any idle Repetitions or needless Circumstances, nor set down any Answer to the Question, to which the Witness cannot depose, other than to such an Interrogatory, this Examinant cannot depose.” But a Witness may be allowed to make use of short Notes, which he brings with him to assist his

(*a*) 7 Ves. 292.

(*c*) Ord. Canc. Bea. Ed,

(*b*) 2 Cox, 288. Dick. 103. 187. *et seq*,

Memory: he cannot, however, bring a Deposition ready drawn and prepared (*a*); nor ought the Examiner to take down scandalous or impertinent Answers (*b*). After the Deposition is taken down, it must be distinctly read over to the Witness, to correct any Mistake; and lastly, it must be signed by the Witness, the Examination is then compleat; for if the Witness should die before he signs his Deposition, it cannot be used in Evidence (*c*); but, the Death of such Witness, before his Cross-Examination would not prevent his Deposition in Chief from being read (*d*). If either Party intends to cross-examine a Witness, he should file Interrogatories for that Purpose, and give Notice of such Intention, before the Witness has finished his Examination in Chief; Cases may arise where it may be advisable to cross-examine, as for instance, to the Execution of Deeds (*e*), where the Plaintiff's Witness secreted himself before he was cross-examined, the Court ordered the Plaintiff to procure the Attendance of the Witness, on the Peril of suppressing the Deposition (*f*). If pending the Examination of Witnesses in Court, it should be advisable to examine other Witnesses to Matters not within the Scope of the Interrogatories already filed, either Party is at liberty, as of course, to file *new* Interrogatories for the Examination of *new* Witnesses, in the Examiner's Office, *before Publication* has passed in the Cause (*g*), to *re-examine* the same Witnesses in Court on new Interrogatories an Order must be obtained (*h*): Where a Defendant, *after Examination* of Witnesses, had obtained leave to re-examine Plaintiff's Witnesses, to shew that the

(*a*) 15 Ves. 380. Ambl.
652.

(*b*) 2 P. Wms. 405.

(*c*) 1 P. Wms. 414.

(*d*) 2 Sch. and Lefr. 158.

(*e*) 17 Ves. 354.

(*f*) 2 Dick. 288.

(*g*) Ord. Canc. Bea. Ed. 97.
Pre. Ch. 386. Dick. 6. 43.

Eq. Ca. Abr. 233.

(*h*) Prac. Reg. Wy. Ed.
420. 13 Ves. 360. 2 Swanst.
395.

Witnesses were interested in the Event, having with the Plaintiff's Knowledge subscribed to pay the Costs of Suit, the Court refused to discharge the Order, or to allow the Plaintiff to file *new Interrogatories* to shew the Witnesses had been released, or to *re-examine* them on the *former Interrogatories*; and dismissed the Application with Costs (a). So, *after Publication* for the Examination of *new* Witnesses, or Witnesses already examined, an Application for Leave must be made to the Court, grounded upon Affidavit of the Party, his Clerk in Court, and his Solicitor, in which the Witness sometimes is joined, denying their several Knowledge or Information of the former Depositions: for the Form of which, see Title "*Affidavit*." And in some Instances, the Master is directed to settle the Interrogatories. The Deposition of a Witness has been allowed to be *amended before* (b) or *after Publication* where a Mistake has been made by the Witness, or the Examiner (c): and even after a Decree, a Re-examination by the Master has been ordered in a Case of Mistake (d). In like Manner, the Re-examination of a Witness to amend or correct a clear Mistake, has been permitted, confining the Examination to that only (e), and not to enter upon a new Examination of Matter *dehors*. But an Application, even before Publication, to re-examine a Witness, to *explain and correct* his former Evidence, although supported by Affidavit, of the Omission of a material Circumstance recollected *afterwards*, has been refused, on the Ground, that the Court could not determine whether the Evidence intended to be added, was merely explanatory of the former, or in itself new Evidence; and that a Party could not by such Means be suffered to *help out insufficient* Evidence;

(a) 2 Swanst. 395. 401.

(d) 3 Bro. C. C. 370. 1

(b) 13 Ves. 280. 1 Cox. Ves. j. 398.

281. Dick. 677.

(e) 1 Ves. 398. 5 Ves.

(c) 2 P. Wms. 646. 5 Ves.

297. 13. Ves. 210, 285. 2

299.

P. Wms. 646. 5 Madd. 467.

that it differed from an Application to correct Evidence, while present before Commissioners (a).

So where a Witness had been examined and had afterwards seen a Paper signed by himself in possession of the Defendant at variance with his Testimony, and before Publication had passed, desired to be re-examined to correct his former Evidence, it was refused as too dangerous to Justice (b). And more recently the Court refused an Application for leave to re-examine a Witness, after the Evidence was closed, and the Cause set down, in order to *add a general Fact*, most material to the Point in the Cause, which in a Memorandum previous to his Examination the Witness had mentioned, that he could state, but had omitted: observing that it differed from an Application to *correct* Testimony as to a Date, by an existing written Document, which had been allowed (c); a *Demurrer* of a Witness to Interrogatories before the Examiner or Commissioners, stating his Objections, which must be on Oath, may be set down for Argument as a Demurrer in a Cause, and if over-ruled, the Witness pays the same Costs as in ordinary Cases of Demurrer; but if the Interrogatories enquire after Matter defamatory to a third Person, and not material in the Cause, the Demurrer will be allowed; a Witness objecting to Answer an Interrogatory, will not be admitted to state by *Affidavit*, what would be the Effect of his Answer; and a Witness *demurring as Attorney* must name the Party by whom he was employed, but he would not be compelled to discover Matter, of which he came to the Knowledge in his Professional Character, for the Privilege is not that of the Attorney, but of the Client (c); and where an Attorney has been examined, the Court will on Motion, refer it to the Master to see what Part of

(a) 1 Meri. Rep. 130. Ord.
Can. Bea. Ed. 73.

(b) 5 Madd. 66,

(c) Ibid. 467.

(d) 2 Swanst. 194. 213.
Bull. N. P. 284.

the Evidence came to his Knowledge in confidence (a) ; but in a recent instance it was said that this Case afforded no Rule to follow, that it is for the Court, and not the Master to judge, whether the Matter inquired of is Confidential (b).

The Examination of a Witness or Witnesses vivâ voce at the Hearing, is admitted to prove Deeds, Writings or other Documents, to be exhibited as Evidence in the Cause, usually termed *Exhibits*.

This Evidence is restricted to the Proof merely of the Execution and Inrolment of Deeds, the Hand-writing of Letters or Signatures thereto, or of Accounts, Office-copies of Judgments, &c. it is never extended beyond the Proof of the Hand-writing of the Person to the Exhibit, or the Hand-writing of the Witness ; not to the Hand-writing of Witnesses who are dead (c), or to let in any Examination whatever, which will admit of a Cross-examination (d) ; and it is likewise restricted to the Application of the Party, who is to make use of the Exhibit, and never allowed on the Application of the opposite Party (e). The Lord Chancellor has a right to examine Witnesses *vivâ voce** (f). A respectable Writer mentions an Instance where liberty was

(a) 2 Ves. jun. 189.

(b) 3 Madd. 124.

(c) Pres. Ch. 64.

(d) 2 Ves. 479. 1 Ja. and

Walk. 15.

(e) 1 Atk. 445. Mos. 381.

(f) 17 Ves. 354. Dick.

641. 14 Ves. 183.

* The Competency of the Lord Chancellor to administer an Oath was confirmed in the Case of *Edward Aylett, Esq.*, an Attorney of great respectability, who, having inadvertently fore-sworn himself in a *vivâ voce* Examination in Court by *Lord Thurlow, Ch.* was indicted and convicted of Perjury ; and upon a Writ of Error from B. R. to the House of Lords, the Objection, that the Lord Chancellor, presiding in the Court of Chancery, had no Legal Authority to Administer an Oath, was principally, though unsuccessfully relied on. *Dick. 641. Ca. Dom. Proc. 1786. 2 Madd. Chan. 331.*

given to examine a Witness *vivá voce* after Publication as to a particular Fact, and the Defendant to cross-examine him (a), and where Doubts have appeared in the Depositions, the Examination has been to clear such Doubts, and to inform the Conscience of the Court; there is no Case where Witnesses have never been examined *at large* at the Hearing; but it should seem that the Court will at the Hearing examine *vivá voce*, upon the Suggestion of a Question, and if a Cross-examination as to the Execution of Deeds should appear to be necessary, the Court will Order a Reference for that Purpose to the Examiner as to an *Exhibit* (b): a Will cannot be proved at the Hearing *vivá voce*; the Legal Execution might be made a Question (c), which cannot be examined to *ore tenus*. The Court will not allow an Exhibit to be proved *vivá voce*, on arguing Exceptions to a Report; nothing can be offered that was not before the Master (d). It should seem upon a Trial of an Issue, if Exhibits are found to be forged, the Court will not allow the Party to go into other Evidence (e). A Master under the usual Order of Reference to examine Parties, is authorized to examine them *vivá voce* if he is not satisfied with the Examination upon Interrogatories (f). In the Court of Exchequer, where an Infant appears to be an interested Party, proof *vivá voce* has been refused (g).

The Course of Practice is to apply by Motion or Petition for an Order*, describing the Deeds by the Dates and Parties, and Letters by their Dates, and from whom and to whom written; for every Document must have a sufficient Description; praying Leave to examine a Witness or Witnesses *vivá voce* at the Hearing, to prove the Execution, or Hand-writing, &c. which will be ordered as of

(a) Dick. 49.

(d) Mos. 190.

(b) Ambl. 145. 17 Ves.

(e) 2 Ves. 579.

355.

(f) 2 Cox, 196.

(c) 1 Atk. 203. 2 Ves. 100.

(g) 2 P. Wms. 463.

* For the Order, see Hand's Chanc. 96, 111, 112.

Course, saving just Exceptions. The Motion-Paper or Petition answered, must be taken to the Register Office, and the Order drawn up, passed, and entered there, and a Copy served upon the adverse Clerk in Court, two Days, at least, before the Hearing of the Cause; and particular Attention should be given, that the Deed, &c. is correctly described in the Order; for the Evidence is restricted to the Deed, &c. mentioned and specified in the Order, and the least Variation would prevent the Proof being received. When the Cause is called on, the Deeds and other Documents, with the Order, and the Witness or Witnesses must be produced to the sitting Register, who will in Court administer the usual Oath to the Witness, and examine him to the Execution or Hand-writing, &c. *vivâ voce*, the Register indorses a *Jurat* thereon, after which, the Deed, &c. becomes an *Exhibit*, and may be read in Evidence in the Cause. The Order and Præcipe is to be left as follows:—

“ Subpoena Edward Manwaring, to appear in
 “ Chancery, returnable the 9th March instant,
 “ to testify *vivâ voce* in Court, pursuant to an
 “ Order of Court for John Lawrence, and
 “ others.”

“ Kensit, 2d March, 1820.

The Return of this Writ must be on the Day the Cause is set down for Hearing, which may be ascertained by the Subpoena to hear Judgment; this Subpoena requires *personal* Service, and if the Witness resides at a distance from London a Tender of Expences, and every Requisite of a Subpoena to testify.

For the Examination of Witnesses residing Abroad, or out of the Jurisdiction of the Court, an Order for a Commission to examine such Witnesses must be obtained by Motion upon Notice, or by Petition supported by an Affidavit stating the *Residence* of the Witnesses in Foreign Parts, that their Evidence is *material*, and that the Party applying is advised and *believes* that without their Testimony he cannot safely proceed to the Hearing of the Cause: in an Injunction

Cause, a Special Affidavit of *materiality* has been required in support of an Application for a Commission to examine a Witness in *India* (a), but it does not seem necessary to state the Points to which the Evidence of the Witnesses is intended to be applied; though it may be sometimes required, and must always depend upon the Circumstances of the Case, nor the Names of the Witnesses to be examined (b): in one Instance it was held, that the Affidavit should state that the Matter in question arose Abroad, or that it must appear so from the Pleadings (c); and where the Commission was to examine Witnesses Abroad to the Proof of a Testator's Intention that his Wife should take Legacies given her by two Codicils, almost identical in their Expressions, it was thought necessary, that the Affidavit should state the Belief of the Party that such was the Testator's Intention (d); but where, from the state of the Pleadings, it appears that an Account must necessarily be directed at the Hearing, the Court will not give Leave to examine Witnesses beyond Sea, so as to delay the Cause, the Commission to examine Witnesses must be postponed till the Cause is heard (e); the Affidavit must be filed and a Copy taken to read in Court, and if necessary an Affidavit of Service of the Notice: the Order must be drawn up, passed and entered at the Register Office, and served upon the adverse Clerk in Court, and the Order left with the Party's Clerk in Court, and Instructions given to make out the Commission, with the Names of the Persons to be inserted as Commissioners, and as the Order usually directs an Agent to be named, who resides at the Place where the Commission is to be executed, to whom Notice of executing the Commission is to be given, and upon whom it is ordered to be good Service; the Name of a Person to

(a) 2 Anstr. 326. 1 Anstr.
201.

(b) 4 Bro. C. C. 89. 7 Ves.
304.

(c) 2 Bro. C. C. 273. 2 Atk.
359.

(d) 1 Bro. C. C. 448.

(e) Barnard, 270.

be appointed Agent, must be also given to the Clerk in Court; where the Witnesses reside in an Enemy's Country the Course of Practice is to direct the Commission to the nearest neutral Port (*a*), and the Person who takes out the Commission and returns it, must make an Affidavit that he received it from the Commissioners (*b*). If Witnesses have been examined Abroad *de bene esse*, and a Foreign Government have refused to let a Commission be executed for examining them *in chief*, the Depositions *de bene esse* have been by Order allowed to be read (*c*); and if the Plaintiff dies, and the Examination of the Witnesses be previous to the Notice of his Death, the Examination will be effectual (*d*). The formulary Proceedings in suing out, executing and returning a Commission for the Examination of Witnesses Abroad, are in other respects similar to the Proceedings in the Examination of Witnesses by Commission, within the Jurisdiction of the Court.

As connected with the Examination of Witnesses, it may be expected that some Notice should be taken of the Examination of Witnesses *de bene esse*, and of Witnesses *in perpetuam rei memoriam*.

The Examination of a Witness *de bene esse* in a Cause, is founded upon an Apprehension, that a Witness to prove an important Fact is in such a *dangerous State of Health* that he is not likely to live to be examined in the ordinary Course of proceeding to examine Witnesses in the Cause, whereby his Testimony is in danger of being lost (*e*), or that he is of the *advanced Age of seventy* (*f*), or speedily going Abroad, or out of the Realm, to Scotland or to Ireland, and not likely to return in time to be examined *in chief* (*g*); or though the Witness be neither aged, nor in a dangerous

(*a*) 12 Ves. 335. Ambl. 62.

(*e*) Carey, 48. Dick. 2.

(*b*) 4 Bro. C. C. 100. 2 Madd. Ch. 254.

(*f*) 8 Ves. 31. 13 Ves. 261. Ambl. 65. 19 Ves. 321.

(*c*) Ambl. 108. 2 Ves. 325.

(*g*) Dick. 382. 454. 1 P.

(*d*) 3 P. Wms. 195.

Wms. 117. Red. Tr. Ch. 51.

State of Health, if he is the *only Witness* to prove some important Fact in the Cause; the Court has decided the latter of itself a sufficient Ground to make an Order for an Examination *de bene esse* (a) where the Application was *merely* on the Ground of the Witness being the *only Person* who could prove the Plaintiff's Demand, and of the Importance of his Testimony, Lord Thurlow held that swearing *generally*, that the Plaintiff had no other Witness did not go far enough, that it did not *specify* in what particular Manner his Testimony affected the Cause, as that he was, as stated, Book-keeper to the Testator (b). It is of course to examine *de bene esse* a Witness above seventy Years old, before Appearance, and the impending Reference of the Bill for Impertinence has been held to be no Objection (c). In one instance Leave was given to examine *de bene esse* a surviving Witness to a Will, upon Affidavit of the Parties concerned being in North America, and that the Witness was upwards of sixty Years old, and greatly afflicted with the Gravel (d). After a Trial of an Issue directed by the Court, an Order has been made to examine *de bene esse* a Witness above seventy, upon a Suggestion of an Intention to move for a new Trial (e): where the Material Facts were in the Knowledge of only *two Persons*, Leave was given to examine them *de bene esse*, without any regard to Age (f): but where one of two surviving Witnesses to a Will, was a Prisoner charged in custody with a Capital Offence, upon an Application to examine *de bene esse*, grounded on the strong probability that the Evidence would be lost, Lord Eldon refused to break through the established Rule (g). A Plaintiff has not been allowed to examine Witnesses *de bene esse* because they were going

(a) 3 P. Wms. 77. 1 Cox
423. 2 Bro. C. C. 641.
Dick. 648.

(b) 1 Cox 178. 2 Bro. C.
C. 641.

(c) 5 Madd. 364.

(d) Ambler, 65.

(e) 6 Ves. 573.

(f) 4 Bro. C. C. 157.

(g) 19 Ves. 321.

to the East Indies, where they were his Servants, and might have been kept at home (a).

A Work of deservedly high Reputation, lays it down generally, that wherever Justice has required it, and there appeared to be an absolute Necessity for the Application, an Examination *de bene esse* would be allowed (b).

The Course of Practice is to apply by Motion or Petition, supported by an Affidavit of the Facts, for an Order to examine a Witness or Witnesses by Name *de bene esse* on the Part of the Plaintiff or Defendant, as the Case may be, and for a Commission to examine in the Country with the usual Directions. (See Title *Notices and Petitions*.) Notice of the Application is not necessary where the Witness is in a dangerous State, or of the Age of seventy or upwards (c), but in all other Cases, Notice must be served upon the Clerk in Court for the opposite Party: the Affidavit in support of the Application should state the Name of the Witness to be examined, and the special Fact, as that he is dangerously ill, or that he is of the advanced Age of seventy, and not likely to live to be examined in chief, or about to leave the Kingdom (d), and not expected to return in time to be examined, or *the only Witness*: and where he is the only Evidence (e) to some material Fact, though neither aged nor infirm, that Fact should be stated, and that the Parties applying are advised and believe, that the Evidence of the Witness is material and necessary for the Protection and Support of their Interest in regard to the Matters in the Bill mentioned, and that there was Reason to apprehend the Loss of the Benefit of such Testimony, unless the Plaintiffs were allowed to proceed in the Examination of such Witness, and that without his Evidence they

(a) Bunb. 320. Com. Dig.
Tit. Chanc.

(b) 13 Ves. 56. 7 Ves.
304. Barnard, 292. 2 Madd.
Chanc. 251. 1 Sim. and Stu. 89.

(c) 8 Ves. 31. 13 Ves. 56.

(d) Dick. 112. 454.

(e) Dick. 648. 4 Bro. C. C.

157. 8 Ves. 31.

cannot safely proceed to a Hearing of the Cause (*a*); and sometimes the Court will require an Undertaking to proceed with all due Diligence, and as much Expedition as the Course and Practice of the Court will admit, to bring the Cause to issue, and examine the Witness in chief (*b*). To obtain a Commission to examine a Witness *de bene esse* Abroad, it has been held not necessary to state the Points to which the Witness is to be examined, it has been held sufficient to state the Name of the Witness, that his Evidence is necessary and material, and that he resides Abroad (*c*); but it has been decided not sufficient for an Agent to take upon himself to swear generally, that he has been informed by the Witness of a particular Fact, which he only, and no other Witness can prove, the Agent must state the Ground of his Belief (*d*): the Affidavit must be filed previous to the Application, and an Office Copy taken to read in Court, or to annex to the Petition, and where Notice is required, an Affidavit of Service of Notice should be in readiness; the Order is to be drawn up at the Register Office, passed and entered, and served upon the adverse Clerk in Court. The Examination is restricted to the Witness or Witnesses named in the Order, which must be left at the Examiner's Office with Interrogatories, for the Examination of the Witness if he resides in Town, or if a Commission to examine should be necessary, with the Clerk in Court, and the Names of Persons for Commissioners on the Part of the Person obtaining the Order, with Instructions to seal a Commission for the Examination of the Witnesses named in the Order who reside above twenty miles from London. The Application may be made by any Party in the Cause, Plaintiff or Defendant, before Appearance or Answer (*e*), and as it should seem at

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| (<i>a</i>) 4 Bro. C. C. 88. | 7 Ves. | (<i>d</i>) 13 Ves. 261. |
| 304. 1 Cox. 177. | | (<i>e</i>) Dick. 2. 4 Bro. C. C. |
| (<i>b</i>) 19 Ves. 320. | | 540. Coop. Ch. 222. 19 Ves. |
| (<i>c</i>) 4 Bro. C. C. 88. | | 320. |

any Time before the Cause is at issue : but it should be observed that a Defendant would not be entitled to an Order to examine *de bene esse* before he has put in his Answer (a). And in all Cases where a Commission to examine *de bene esse* issues, Notice of executing the Commission is indispensable, and this Rule is so inflexible, that the Examination of a Witness without regular Notice to the other Side, has been decided of itself to be a sufficient Ground to discharge the Order, and to suppress the Depositions with Costs (b). In very urgent Cases, it should seem that an Order to examine *de bene esse* may be obtained after Service of the Subpœna, and before Appearance. There seems formerly to have been considerable Difficulty upon the Question, whether there could be an Examination *de bene esse* before Appearance ; but this seems to have been got over thus : there being no Instance of permitting this Examination before Appearance, except after the Service of a Subpœna, and then there being no Appearance, the Court holding the Defendant to be in contempt, has granted the Examination *de bene esse*, but always in the Case of an Adult ; Infancy, however, seems to make no difference. Lord Eldon made an Order to examine upon a Return of *non est inventus* by the Messenger, under an Order to apprehend an Infant in contempt (c), where a Plaintiff at Law had filed a Bill for the Examination of a Witness *de bene esse*, and before Answer, upon Notice, had obtained an Order for his Examination *de bene esse*, and had given Notice of the Examination, and of the Interrogatories intended to be put, and on the same Evening examined the Witness who left London the next Day for a Foreign Country, and never returned, and afterwards obtained an Order to publish the Deposition, to be read in Evidence at the Trial at Law, the Deposition was held, on the Trial, to be admissible ; for as the Defendant had

(a) Dick. 92.

(b) 4 Bro. C. C. 540.

(c) 19 Ves. 320. 372. 4 Madd. 247.

Notice of the Examination, he might have cross-examined, or have applied for further Time, and that not having done either, it might be presumed, that he did not intend to cross-examine (*a*). Where a Defendant had cross-examined, but not examined *in chief*, under the Plaintiff's Commission, the Court held he was entitled to a Commission to examine Witnesses Abroad, and was not to be put to filing a Bill for that Purpose (*b*).

The Proceedings in examining Witnesses *de bene esse* in Town or by Commission, differ in no respect from the like Proceeding in Examination of Witnesses in Chief.

In this place may be considered the *Examination of Witnesses de bene esse*, in a Suit instituted for taking and preserving the Testimony of Witnesses speedily going Abroad, and of Witnesses residing in Foreign Parts, to be afterwards used in a Court of Common Law, in support or defence of an Action then depending. Bills for this Purpose are classed under Original Bills not praying Relief; they merely state the Facts, and show an Interest in the Subject; but though no Relief be prayed (*c*), it is usual to pray a Discovery, and Leave to examine Witnesses *de bene esse* about to leave the Kingdom, and not likely to return in time to be examined at the Trial, that their Testimony may be preserved and recorded, and also a Commission for the Examination of Witnesses resident Abroad; and where the Bill is filed by a Defendant in an Action at Law, an Injunction to restrain the Plaintiff in the Action from proceeding in the mean time. An Affidavit of the Truth of the alleged Statement, by which the Evidence is in danger of being lost, must be annexed to the Record of the Bill; an Omission in this respect might be taken advantage of, by Demurrer (*d*): so if Relief be prayed, the Bill would be

(*a*) 1 Maul. and Sel. 4.
2 Madd. Ch. 252.

(*b*) 2 Ves. and Bea. 116.
1 Meri. 434.

(*c*) Red. Tr. Ch. 27, 41.
Coop. Pl. 57. 1 Sim. and Stu. 92.

(*d*) Red. Tr. Ch. 121. 1 P.
Wms. 117. 4 Bro. C. C. 480.

demurrable, or, as it has been said, dismissed with Costs (*a*), or if brought to a Hearing, struck out of the Paper of Causes (*b*). Where the Testimony of a single Witness has been of the utmost Importance, and the only Witness to the Point, a Bill has been permitted, apparently upon the single ground that he was the only Witness, and the Danger of losing all Evidence, but an Affidavit of the *Witness* was annexed (*c*): in one instance where the Discovery sought was in aid of a Legal Title, and before Action for discovering by whom the Plaintiff had been injured, and against whom to bring his Action, the Court entertained the Suit (*d*): but it has been more recently decided, that where a present Action may be brought, the Bill is demurrable, if it do not aver that an Action is depending (*e*). It should be observed that a Party may be entitled to a Commission to examine Witnesses Abroad, and not to a Discovery; and so determined in overruling a general Demurrer to a Bill for a Discovery, and a Commission Abroad in aid of a Defence to an Action at Law for a Libel (*f*). Where the Bill is merely for a Discovery, in aid of an Action, and a Commission to examine Witnesses Abroad, a Commission has been allowed to issue before Answer, where the Time for answering has expired (*g*): and if the Plaintiff has obtained the common Injunction for Want of Answer, he has been held entitled to a Commission, and to an Extension of the Injunction to stay Trial (*h*); and an Order has been made for a Commission to examine *Abroad*, returnable

(*a*) 1 Scho. and Lefr. 316.

3 Atk. 429. 8 Ves. 3. 11

Ves. 509.

(*b*) Mos. 185. 2 Bro. C.

C. 10. 3 Bro. C. C. 475.

(*c*) Red. Tr. Ch. 120. 1 Atk.

450. 3 P. Wms. 77.

(*d*) 1 Bro. C. C. 470. Dick.

652. 1 Madd. Ch. 190.

(*e*) 1 Sim. and Stu. 91.

(*f*) 5 Madd. 218. 1 Atk. 450.

(*g*) Coop. 222. 19 Ves.

372. Dick. 355.

(*h*) 2 Swanst. 258, and the Cases cited.

without delay, pending an Injunction against an Action, without paying Money into Court (a). *Lord Eldon* has decided that as a Defendant is entitled to examine Witnesses *in chief* under the Plaintiff's Commission, he is therefore entitled to a Commission to examine his own Witnesses Abroad, under the Bill filed by the Plaintiff (b). An Application that the Plaintiff might be ordered to communicate to the Defendant the Interrogatories exhibited by him, grounded on the Practice of the Courts of Law, has been refused (c). From recent Decisions it seems to be settled by *his Honour the Vice Chancellor*, that a Commission to examine cannot be obtained unless Defendant is in Contempt, or has put in his Answer, or the Defendant's Time for answering is out; for until Defendant has answered, there is no Issue tendered in the Cause, nor any Matter in dispute between the Parties, and previous Depositions are considered only as voluntary Affidavits; but if the Defendant be in Contempt, the Plaintiff may, notwithstanding, have a Commission, otherwise he might lose his Testimony by default of Defendant (d). Where a Bill had been filed by a Plaintiff at Law, for a Discovery and a Commission for the Examination of Witnesses Abroad, in aid of the Action, and the Defendant filed a Bill in the Exchequer against the Plaintiff at Law, for a Discovery and an Injunction to restrain the Proceedings at Law, and for want of Answer, had obtained the common Injunction to restrain the Proceedings in the Suit at Law; upon an Application by the Plaintiff in the Cause in Chancery, for a Commission to examine Witnesses Abroad, supported by the usual Affidavit, the Vice-Chancellor in refusing the Motion, observed, that a Proceeding merely in Chancery, could not be restrained by an Injunction against Proceedings at Law, but that the Commission moved for must be considered as

(a) 3 Ves. and Bea. 76. (c) 2 Swanst. 373.

7 Ves. 304. 12 Ves. 335. (d) 1 Madd. Rep. 208.

(b) 2 Ves. and Bea. 116. 4 Madd. 247.

1 Meri. 434.

a Step in the Proceedings at Law, and as such was restrained by the Injunction in the Court of Exchequer. And that it was not necessary that any Application should on this Occasion be made by the Defendant to the Court of Exchequer, as the Court of Chancery would on the Motion, take notice of the Proceedings which have been had there. (a). The junior Practiser should be informed that under a Bill filed for a Commission to examine Witnesses Abroad, and a Commission sent out accordingly, a Witness returning to England before the Commission has reached its Destination cannot be examined *de bene esse* in aid of the Trial at Law, upon the Ground that he is about to leave the Country again before the Trial can come on; the *Vice Chancellor*, in refusing an Application for that Purpose, observed that it was a different Relief, and that the Bill must be amended (b). Where a Witness, going to the *West Indies*, was examined *de bene esse*, upon Application to publish his Deposition, it appearing that he was in *Ireland*, and Publication not passed, it was held that he must be examined in chief (c). If, before the Examination of a Witness *Abroad*, under a Commission, the Plaintiff dies, and the Examination is *previous to the Notice* of his Death, the Examination will be effectual (d). Commissions for the Examination of Witnesses residing *Abroad*, returnable without delay, need not be returned as Home Commissions, before the last Return of the ensuing Term after they are issued: a reasonable Time is allowed for the return, according to Circumstances (e).

As introductory to the *Examination of Witnesses in perpetuam rei memoriam*, it may be proper to observe, that where the Testimony of Witnesses is in danger of being lost, before the Matter to which it relates can be made the Subject of judicial Investigation, a Court of Equity will lend its Aid to preserve and perpetuate their Testimony (f),

(a) 4 Madd. 362.

(e) 1 Sim. and Stu. 89.

(b) 5 Madd. 19.

(f) Red. Tr. Ch. 41. 120.

(c) Dick. 473.

Coop. Pl. 52.

(d) 3 P. Wms. 195.

by permitting Bills to be filed, for the Purpose either of taking and preserving the Testimony of Witnesses to be used *de bene esse*, or of recording and perpetuating their Testimony: these two Species of Bills, though frequently confounded, seem, from the Situation of the Parties, to be distinct from each other (*a*): the Former is generally exhibited by a Person out of Possession, having Witnesses *infirm* or *aged*, or a single Witness, and for a Commission to examine in aid of a Trial at Law then depending, and unless it be so averred in the Bill, and the requisite Affidavit annexed, it is demurrable (*b*), which has already been adverted to: the latter is usually filed by a Person in actual and undisturbed Possession, having no Opportunity of examining Witnesses at Law, where the Matter in question can by no means be made the Subject of present judicial Investigation, and it is absolutely necessary to prevent a Failure of Justice to preserve their Testimony. The Testimony of Witnesses may be perpetuated to prove a Modus, a Will, a Deed, an usurious Contract, Legitimacy of Birth, of Marriage, Waste, or any vested Interest (*c*); but it should seem that the Bill must allege that the Matter in question cannot be made the Subject of an immediate Action, and the Facts to be examined to should be particularly stated and set forth (*d*) A case of very ordinary occurrence, the Proof of a Will, *per testes*, in Chancery, where the Examination is restricted to the subscribing Witnesses, and to the Question of Sanity, merely as incidental (*e*), may be so considered: as in the Instance of Lands devised by Will, from the Heir at Law, it is a common Practice to prove the Will in the Court of Chancery, and to perpetuate the Testimony of the subscribing Witnesses; and for this Purpose to file

(*a*) 6 Ves. 251. 263. 1 Ves. 308. 354. 441. 1 Atk. 284.
and Boam. 139. 3 Meri. 680. 571. 3 Bro. C. C. 481.

(*b*) 8 Ves. 404. 1 Sim. (*d*) 1 Madd. Chan. 193.
and Stu. 87. 91. 1 Sim. and Stu. 88.

(*c*) Pre. Chan. 531. 1 Vern. (*e*) 3 Meri. 678.

a Bill setting out the Will *in hæc verba*, and upon coming in of the Defendant's Answer, to proceed to issue, and to examine the subscribing Witnesses to the Will, if living, and to the Proof of the Hand-writing of any who are dead, which being done, and Publication passed, Office Copies of the Depositions are delivered out, and the Cause is at an end : after Publication it is not unusual to inroll all the Proceedings, and lastly, to exemplify them under the Seal of the Court ; and the Exemplification under Seal is of itself Evidence in support of the Plaintiff's Title in all Courts of Law and Equity (a). A Defendant has been allowed to examine Witnesses to perpetuate Testimony under the Plaintiff's Commission ; and if a Witness dies, to have his Deposition published if necessary ; but generally the Depositions are not allowed to be published but in a very strong Case made, and the Order restricts the Publication to the Deposition (b) of the Deceased Witness.

This mode of Examination in Practice differs in no respect from the Proceeding to examine Witnesses as in ordinary Cases in Town, or by Commission, for which Instructions are given in a former Part of this Work.

It will not escape the Observation of a severe Practiser, that we have presumed each Witness to be *omni exceptione major* ; it remains, therefore, to subjoin the Course of Proceeding to examine into the *Credit* and *Competency* of a Witness examined in a Cause (c).

It should seem by the strict Rules of Practice, that *after Publication* has passed, there can be no Examination to the *Competency* of a Witness, but there may be to his *Credit* ; the Reason assigned has been because the Competency of the Witness might have been objected to, and enquired into upon the Examination *in chief* (d) : a Learned Judge

(a) Peake's Ev. 67. 1 Phil.	(c) Peake's Ev. 129. 1
Ev. 385. 393. Ord. Can. Bea.	Phillips's Ev. 17. 289.
Ed. 32. 45. Curs. Cane. 175.	(d) 3 Atk. 643.
(b) 1 Meri. 434. 3 Meri. 680.	

held this Distinction to be a Difference without Colour of Reason (*a*). *Lord Hardwicke* was of Opinion, that it was not allowable *in general* to examine into the *Competency* of a Witness *after Publication*, but his Lordship seems to have admitted that the Rule would bend to Circumstances, and that, even in that Stage of the Cause, it would be allowed where the Objection to Competency arose from a Matter that came to the Knowledge of the Party, after the Examination of the Witness (*b*); and *Lord Eldon*, not controverting the Decision of his Noble and Learned Predecessor, in adverting to Examinations to Competency, has imputed the Fault to the Party complaining; for that there might be a general Interrogatory addressed to every Witness upon his Examination in chief, whether he has or not any Interest in the Suit (*c*). His Honour the Vice-Chancellor has decided, that *after Publication* has passed, there cannot *in general* be an Examination to Competency (*d*): and a very Learned Author in a Work of acknowledged Merit, has considered these Decisions as establishing the Distinction between *Competency* and *Credit* (*e*). Where the Objection to the Competency of a Witness has arisen from Matter which has come to the Party's Knowledge after the Examination, the Court has thought it reasonable that it should be investigated, and to allow an Inquiry into the Competency of the Witness, and that the proper Course of Proceeding would be by Motion for Leave to examine upon the Ground of *Interest* at the Time of the Examination (*f*), intimating that the Inquiry might have been obviated by addressing an Interrogatory, framed for that Purpose, upon the Examination in chief (*g*). And where strong Suspi-

(*a*) 2 Vern. 463. 3 Atk. 643. Term Rep. 27. Peake's Ev.

(*b*) 3 Atk. 643. 129.

(*c*) 8 Ves. 324. 9 Ves. 145. (*f*) 3 Atk. 643. Coop.
10 Ves. 49. Rep. 300. Gwill. 1250. 1

(*d*) 2 Madd. Rep. 328. Vern. 254.

(*e*) 2 Madd. Ch. 422. 3 (*g*) 1 Ves. j. 399. 8 Ves. 326.

cion of Interest, either personally or as Trustee, has attached to a Witness who has been examined, an Issue has been directed at the Hearing, in order that, upon his Examination in a Court of Law, Questions might be put to him to discover his Interest: and in the latter Case *Sir William Grant*, M. R., was pleased to observe, that he thought this Court might order an Interrogatory to be exhibited to him in the Nature of a *voir dire* (a). If a Witness is *interested*, and known to be so previous to his Examination, a general Interrogatory might be framed, requiring him, on his Cross-examination, to answer whether he is so or not; and if he actually denies the Interest, the Party affected by his Evidence may discredit the Witness by examining Witnesses as to the Truth of that Proposition (b). And if a Party has omitted to examine a Witness as to his Interest in the Suit, even after the Witnesses have been examined and cross-examined, and the Commission closed, he may, in that Stage of the Cause, *before Publication*, move, on Affidavit of the Facts, for Leave to re-examine the Witness as to the Fact of Interest (c). And even *after Publication*, a Witness will be allowed to be examined as to his Credibility, where the Objection came to the Party's Knowledge after the Examination (d); and it should seem that although an interested Witness might not be objected to at the Time of his Examination, if it appear at the Hearing, upon the Face of his Deposition, that he is interested, the Court will suppress the Deposition; and so if an *interested Witness* be cross-examined; that has been held not to be a Waiver of an Objection on the Ground of Interest, to the Competency of such Witness (e); but if, at the Time of his Examination, the Witness is disinterested, and he becomes interested afterwards, his Deposition has been allowed to be read (f).

(a) 3 Bro. C. C. 228.

(e) Gwill. 1255. Coop.

(b) 8 Ves. 326. 3 Atk. Rep. 300.

643.

(f) 1 P. Wms. 288. 2 Ves.

(c) 2 Madd. Rep. 322.

42. 2 Atk. 615.

(d) 3 Atk. 643.

An Examination to the Credit of a Witness who has been examined in a Cause, is always regarded with great Jealousy, and the Rules of the Court require that the Examination should be restricted to the *Credit* of the Witness; and to Facts affecting *Credit and Character only*, and these not material to the Matter in issue in the Cause: *Lord Eldon* has observed that the Use of examining to Credit is, that the Court may weigh the Testimony of that Witness whose Credit is the Object of the Examination; that the Guards of the Court upon such Examinations would be defeated by permitting it to take place after a Decree, that the Court should take Care that the Examination should be had before the Hearing (*a*).

It has been laid down in a Work of great Merit, that the most proper Time to examine to the Credit of a Witness is after Publication has passed; for till then it cannot be known whether it was necessary (*b*); but the Examination may be either *before* or *after* Publication, and with the Leave of the Court upon special Application, and Notice is indispensably necessary, whether before or after (*c*): the Standing Orders direct that no Examination is to be had of the Credit of any Witness but by special Order to be sparingly granted (*d*). Where Evidence to the Credit of a Witness had been taken upon the Examination *in chief*, without any Order for that Purpose, the Interrogatories and Depositions were suppressed for Impertinence (*e*); but although it requires a special Motion, it is not necessary in all Cases that it should be supported by Affidavit, and the Application seems to be considered as of course (*f*). Where Publication had passed five Months, an Order was made to examine upon general Interrogatories to the Credit of a Witness as to such particular Facts only as were not material to the Issue, and so as not to delay the Hearing (*g*). After Pub-

(*a*) 1 Ves. and Bea. 153.

(*e*) 12 Ves. 406.

(*b*) Dick. 532.

(*f*) 2 Ves. and Bea. 267.

(*c*) 12 Ves. 406.

Dick. 532.

(*d*) Ord. Canc. Bea. Ed.

(*g*) 19 Ves. 127.

lication, and a Cause set down, it is too late to examine to Credit (*a*): but on an Application to examine as to Credit, the Court does not consider previously whether the Examination relates to the Matters in issue; but if, under Pretence of examining to Credit, the Examination should be extended to any Fact in issue, the Deposition will be suppressed (*b*). If a Commission to examine Witnesses should be necessary, it is generally directed to the Commissioners under the former Commission (*c*); and although the impeached Witness may have been cross-examined, the Court will make the Order restraining the Examination to Facts not in issue in the Cause (*d*); and if the Execution of the Commission should be delayed till after the Hearing, the Party obtaining the Commission will be visited with the Costs of it (*e*); but a Commission into Foreign Parts, or out of the Jurisdiction of the Court to examine to the Credit of a Witness is never granted, from a Tendency to introduce a certain Method of Delay: if, in a Case of great Urgency it should be allowed, it must be upon the Ground that no Person in England could be found to swear any thing to the Witness's Credit (*f*); and in taking Objections to either Credit or Competency, the Court will not assist the Party, if he has laid by for any Length of Time, and it assumes the Appearance of Delay (*g*): an Examination to either Credit or Competency must be confined to the *general Credit* of the Witness; all that can be inquired of is, whether the Witness is to be believed upon his Oath (*h*): a Person is not allowed to discredit his own Witness (*i*).

The Course of Practice on examining to the Credit of a

(*a*) 3 Atk. 522.

(*f*) 3 Atk. 643.

(*b*) 3 Atk. 594. 643. 1

(*g*) Dick. 533.

Ves. j. 399. 10 Ves. 49.

(*h*) 1 Ves. and Bea. 153.

1 Ves. and Bea. 153.

3 Ves. and Bea. 94. Ord.

(*c*) 9 Ves. 145.

Canc. Bea. 187.

(*d*) 8 Ves. 324.

(*i*) 8 Ves. 327.

(*e*) 1 Ves. and Bea. 151.

Witness is, to exhibit Articles, for the Form of which see the subsequent Part of this Work, title "*Articles*," assigning special Causes of Objection to the Credit or Competency of the particular Witness. And it would be advisable to lay the Draught of the Articles before the junior Counsel who prepared the Pleadings in the Cause, for his Perusal and Approbation, though his Signature is not necessary. The Articles must be ingrossed upon five Shillings Stamped Parchment, and filed as of course at the Examiner's Office, if the impeached Deposition was taken in Town, or delivered to the Party's Clerk in Court to be filed in the Six Clerks Office, if by Commission for Examination of Witnesses in the Country, and annexed to the Deposition of the impeached Witness, a Certificate of the Filing must be obtained from the Examiner, or Six Clerk, and an Application, by Motion upon Notice, or by Petition grounded upon the Certificate of the Objections or Articles being filed, for Leave to file Interrogatories for the Examination of Witnesses, in support of the Articles, and, if necessary, for a Commission to examine Witnesses in the Country, by general Interrogatories (*a*), but a Commission to Foreign Parts will not be ordered unless upon special Circumstance (*b*). The Application requiring Notice, differs in that respect from a Motion of Course, and may, in strictness, be termed a Special Motion, and the Orders of Court term it a *Special Order*; but an Affidavit in support of the Motion is not required (*c*). The Order must be drawn up, passed, and entered at the Register Office, and a Copy served upon the Adverse Clerk in Court, with a Copy of the Articles, or Objections; and another Copy served upon the Examiner: if the Examination to the Discredit of the Witness be in Town, the Interrogatories for the Examination of Witnesses in support of the Articles, must be signed by Counsel, and engrossed upon the proper Stamp, and

(*a*) 19 Ves. 128.

(*b*) 3 Atk. 643.

(*c*) 2 Ves. and Bea. 267.

Dick. 532. 8 Ves. 324.

filed (a) at the Examiner's Office, and the Order produced at the same Time, without which the Interrogatories cannot be received, and Notice of filing served upon the adverse Clerk in Court; the further Proceedings are similar to the ordinary Course of Examination of Witnesses in a Cause. The adverse Party may examine Witnesses in support of the Credit of the impeached Witness, and Publication of the Depositions may be passed at the same time Publication passes in the Cause; or afterwards, by Rule, Order, or Consent, with Reference to the Examination only.

Rules to produce Witnesses, and Rules to pass Publication, should be given during the Proceeding to examine Witnesses; they may be entered by Plaintiff immediately upon Service of the Subpoena to rejoin, or Defendant's Appearance to rejoin *gratis* (b): the first of these is termed an *Ordinary Rule*; the other a *Rule to shew Cause why Publication* should not pass (c): the latter only would be sufficient where a joint Commission has issued under which Witnesses have been examined on both Sides. All Rules expire in eight Days *inclusive*, and the eight Days comprised in each Rule must be Days in Term; a Rule may be given any Day in Term, but it must be entered eight Days before the Expiration of the Term in which it is given. The Rules are, by the Orders in Chancery, directed to be entered by the Clerk in Court in the Common Book, called the (d) *House-Book* of the Six Clerk, in whose Division the Original Bill was filed; the Entry is transcribed by the Clerk in Court into his Writ-Book, which is taken to the Register-Office to be entered; this is done by the Register setting his Initials thereto, upon payment of a Fee of one Shilling

(a) Ord. Canc. Bea. 187.

(b) Dick. 349.

(c) Ord. Canc. Bea. 190.

(d) Ibid. 110. 331. and 8

VOL. I.

Ves. 360, where it is said there is no such thing as a House-Book.

and four-Pence (*a*). These Rules are given by the Clerk in Court, as instructed by the Solicitor, and the Clerk in Court entering the Rule, must give a Note in Writing to the adverse Clerk in Court of the Rule being given; a Co-Plaintiff may give these Rules, and if the Plaintiff neglect to give them for one Term after the Cause is at issue by the Subpœna to rejoin, they may be given by the Defendant (*b*). It may, in some Cases, be proper to give Rules to produce Witnesses, and to pass Publication, where no Witnesses have been examined on either Side, to exclude the adverse Party from examining. On the Expiration of the Rule to pass Publication, if no Order has been served to enlarge Publication, Office Copies of the Depositions of the Witnesses examined in Town, and by Commission, will be delivered out by the Examiner and the Clerk in Court; and, if requisite, a Copy of the Rule should be served upon the Examiner, to authorize him to deliver out the Office-Copies.

Publication of the Evidence taken in the Cause, by delivery of the Office Copies of the Depositions of the Witnesses examined, may pass by *Rule, by Order of Court, or by Consent of Parties*: where the Rule to pass Publication has been suffered to run out, and no Act has been done to enlarge the Time, Publication passes of course *by Rule*; if an Order should be obtained to enlarge the Time limited by the Rule, Publication passes *by Order* (*c*): and all Parties having examined their Witnesses, a Rule may be entered to pass Publication *immediately by Consent* (*d*) of the respective Clerks in Court.

Publication may be enlarged after a Rule to pass Publication has been entered, upon the Application of a Party who has examined no Witnesses, as of course; or if he

(*a*) Ord. Canc. Bea. Ed.
231. 336.

(*b*) Dick. 84.

(*c*) Prac. Reg. Wy. Ed. 355.

(*d*) Sed. vid. Ord. Canc.
Bea. 319.

has not examined all his Witnesses, and intends to examine more, but it should seem if Witnesses have been examined, the Application for the Order must be upon Notice (a) : if the Cause has not been set down for hearing, the Application is of course, before or after the Rule to pass Publication has expired ; but, in the latter Case, the Application must be supported by an Affidavit, which must express that the Party applying, his Clerk in Court, and Solicitor, have not seen, read, or been informed of the Contents of the Depositions, and that they will not see, read, or be informed until the enlarged Time of Publication : for the Form of the Affidavit, see Title "*Affidavit*." And Publication has been enlarged upon a Special Case, where further Evidence was shewn to be necessary, and that it could be had without Injustice or Danger, and where it would not be to the Prejudice of a Party by delaying the Hearing of the Cause, but not upon the Ground of Want of Knowledge of the Rules of Proceeding, or the Negligence of the Solicitor (b). And although Publication had been frequently enlarged before, and the Cause was of five Years standing, where the Delay had been accounted for by Affidavit, and the Court was satisfied that the Inquiries to be pursued were likely to further the Ends of Justice, Publication has been further enlarged (c). And where, by Accident, or Surprize, Publication passes before the Defendant has examined his Witnesses, and there is no blameable Negligence, the Court will allow Witnesses to be examined on the usual Affidavit that the Depositions have not been seen (d). And it should seem, that before Publication, where Leave has been granted, the adverse Party has been allowed to cross-examine, and likewise to examine at large (e) ; but where the Defendant obtained Leave to enlarge Publication, and neglected to examine Witnesses within the enlarged Time,

(a) 6 Madd. 51. Dick. 495.

(d) 3 Madd. 429.

(b) 13 Ves. 512.

(e) 2 Vern. 253. 2 Madd.

(c) 3 Madd. 103.

Chan. 419.

and after Publication had passed, obtained irregularly an Order as of course to enlarge it, and apprised of the Irregularity, persisted in examining Witnesses; an Application that Publication might be further enlarged, or the Evidence taken under the informal Order read at the Hearing, was dismissed with Costs (*a*). And the Court has refused to enlarge Publication at the Instance of a Party who had examined no Witnesses, but had taken the Depositions of the opposite Party out of the Office, though it was alleged to have happened through Mistake (*b*).

After Publication has passed, prior to a Decree, and the Depositions have been seen, further Witnesses cannot be examined without Leave of the Court, which cannot be obtained but with great Difficulty, and that as to particular Facts only (*c*). The Court, in making an Order to enlarge Publication before the Cause is set down, does it provisionally, so as *not to hinder the Party from setting down the Cause*. By the Standing Orders of the Court, no Cause can be set down to be heard the same Term wherein Publication passes, unless by Consent, or Special Order (*d*); but Publication may be enlarged upon the Application of either Party, where the Cause stands so far off in the Paper, that it is not likely to come on in its turn to be heard, before the enlarged Time expires; and the Party setting down the Cause may make the Application: and a second Application to enlarge Publication has been allowed, though the Cause was set down, it being a hundred off, and little Probability of its being heard before the enlarged Publication expired (*e*). But in all Applications to enlarge Publication, the Court always restricts the Time to a given Period, within which the Cause is not likely to come on, and the Party applying should always be prepared to state

(*a*) 3 Madd. 429.

(*b*) 2 Cox. 289.

(*c*) 8 Ves. 324. Coop. Rep.

292.

(*d*) Ord. Canc. Bea. Ed.

319. 333. Prac. Reg. Wy.

Ed. 354.

(*e*) Dick. 495. 1 Madd. 85.

correctly on what Day Publication passes, and in what Manner, by Rule or Order.

Where there is an Original and Cross Cause, and the Plaintiff in the Original Suit is in Contempt for Want of Answer to the Cross Bill, the Plaintiff in the latter having put in his Answer to the Original Bill, is entitled as of course to enlarge Publication in the Original Cause for a Fortnight after the Answer has come in to the Cross Bill (a); but if the Cross Bill be filed after the Original Cause was proceeded in, as in the Instance of an Answer filed in the Original Cause: to enlarge Publication, the Application must be Special on Notice (b): where therefore, a Motion was made after Rules to pass Publication had issued, and the Cause set down for hearing, to enlarge Publication until a Fortnight after an Answer to the Cross Bill, the Application was refused with Costs; no Special Case being made by Affidavit (c). Where either material Conversation, or an Admission of a Defendant occurs after Answer, or Replication, or Examination of Witnesses, or a new Fact happens *after Publication*, which it is material to bring before the Court in Evidence upon hearing the Original Cause, a *Special Application* should be made for the Purpose of examining, and that the Depositions may be read at the Hearing; and if a Discovery is required, a Bill should be filed for that Purpose merely, and an Application made that the Answer comprehending the Discovery may be read at the Hearing of the Original Cause (d); if the Matter was brought before the Court by Supplemental Bill, it might be demurrable (e); but it should be observed that the Plaintiff in the Original Cause loses his Priority of Suit, by amending his Bill after a Cross Bill is filed (f).

(a) 1 Atk. 20. 291. 3 Bro. C. C. 429. 4 Bro. C. C. 478.

(b) 2 Ves. 336. 16 Ves. 93.

(c) 16 Ves. 133. 2 Ves. 218. 3 Atk. 723.

(d) 17 Ves. 148.

(e) Ibid.

(f) 2 Cox. 371. 2 Atk.

By the Standing Orders of the Court, Depositions of Witnesses taken in Town by the Examiners, are to be closely kept in their Office, and no Copy or Extract delivered out until Publication passes by Rule or Order: those taken by Commission are, immediately after bringing in, to be delivered to the sworn Clerk who made out the Commission, to be securely kept, without opening, until Publication regularly passes in the Cause, otherwise to be void, and not read in Evidence (a). If Witnesses are examined in Town, the Order to enlarge Publication must be served upon the Examiner, before Publication passes in the Cause, by Rule or a former Order. It may be useful to remark, that where the Examiner has been served with an Order enlarging Publication for a given Period; after the Time limited by the Order has expired, he cannot examine any Witnesses, although they may have been previously sworn to the Interrogatories, and have not attended to be examined; Leave of the Court must be obtained, and the Application Special upon Notice (b). Publication being passed, Office Copies of the Depositions taken in Town must be obtained at the Examiner's Office, in the Rolls Yard, and those taken by Commission of the Clerk in Court, and before they are delivered out, the Solicitor should be careful to have them signed by the proper Officer, of whom he receives them; if the Office Copies of Pleadings, or Depositions, required to be read on the Hearing, be not signed, they cannot be read in Evidence; and the Cause will be ordered to stand over upon Payment of Costs of the Day, which, in Court is £5, and at the Rolls, £3. 6s. 8d. to the other Party (c).

The Deposition of a Witness examined *de bene esse* where the Witness dies before he can be examined in chief, or is beyond Sea, and not likely to return in Time to be examined in the ordinary Course of examining Witnesses in

(a) Ord. Canc. Bea. Ed. 230. 291.

(c) 1 Cox. 437. Ord. Canc. Bea. Ed. 491.

(b) Gilb. For. Rom. 141.

the Cause, or upon a Trial at Law (*a*), may be published by Order, upon Notice and Proof of his Death, or of his Residence out of the Jurisdiction of the Court.

It has been laid down by a Gentleman, to whose Labours the Profession is much indebted, as an established Rule of the Court of Chancery, that Depositions taken *de bene esse* are not to be published, unless there is a moral impossibility to have an Examination in Chief (*b*): as in the Instance of a Commission issuing to examine Witnesses abroad, and the Execution prevented by the Interference of a Public Authority there; the Publication of a Deposition taken *de bene esse* has been ordered (*c*); the Deposition taken *de bene esse* of a Witness above eighty Years of age, and infirm, and unable to attend in person, has been ordered to be read on the Trial of an Issue (*d*); and a like Order has been made where the Witness has been dead, or in such a State of Health as to be unable to attend (*e*); or from Age and Infirmary incapable of attending without great Danger of Death (*f*). The Deposition of a Witness examined *de bene esse*, and the Witness not returned from abroad, has been ordered to be published, to be made use of at a Trial at Law (*g*). And for the like Purpose, a Commission under which a Witness had been examined and cross-examined *de bene esse*, and since dead, was ordered to be opened by the Clerks in Court, and the Deposition copied and published (*h*); but the Court refused to order Depositions taken *de bene esse* to be published for the Purpose of comparing them with the Depositions in the same Cause taken upon the Examination in Chief (*i*). And the Court also refused to order Publication of Depositions taken *de bene esse*, upon the Incapacity of the Witness from a bodily Injury, to attend; but on the Affidavit

(*a*) Dick. 540. 2 Ves. 497.
1 Vern. 331.

(*b*) 2 Madd. Chanc. 252.

(*c*) 2 Ves. 337. Ambl. 108.

(*d*) Dick. 182. 1 Cox. 184.

(*e*) 15 Ves. 299.

(*f*) 1 Ves. and Bea. 335.

(*g*) Dick. 540.

(*h*) Dick. 144.

(*i*) 1 P. Wms. 567.

of a Surgeon, as to the Impossibility of the Witness's Attendance, the Court ordered the Officer to attend with the Original Deposition, to be tendered if the Incapacity of the Witness should be proved (*a*). Depositions of Witnesses examined *de bene esse*, afterwards becoming interested, have been ordered to be published (*b*).

The Deposition of a Witness *in perpetuam rei memoriam*, is not to be published in the Life-time of the Witness, unless a strong Case is made (*c*) out, and subject to the Discretion of the Court. Lord Eldon has laid down, as Exceptions to the general Rule, Sickness, Incapacity to travel, or Accident (*d*). The Orders for Publication are founded on Affidavit of the Death of the Witness; and in general restricts the Publication to the Deposition of the deceased Witness: where Witnesses have been examined by both Parties on a Joint Commission, Publication of the Depositions of the Witnesses, who were dead, has been ordered, but not the Depositions of the other Witnesses (*e*). The Dismission of a Bill to perpetuate Testimony, irregularly set down to be heard, does not prevent the Depositions taken under it from being read in Evidence (*f*). Depositions under a Bill to perpetuate Testimony in Proof of a Will of Lands *per testes*, are published as of course, and the Cause is at an End (*g*).

The Course of Practice to obtain an Order to publish a Deposition taken *de bene esse* is, after Publication has passed in the Cause, to apply by Motion, upon Notice to the adverse Clerk in Court, or by Petition to the Master of the Rolls for an Order to publish the Deposition of the Witness. See Titles, "*Notices*" and "*Petitions*." The Death of the Witness, or his Absence abroad, or any other special Circumstance to support the Application, must be verified by

(*a*) 1 Ves. and Beam. 21.

(*b*) Dick. 504.

(*c*) 3 Meri. 678.

(*d*) 19 Ves. 670. 1 Meri.

434.

(*e*) 1 Meri. 434. Dick. 540.

(*f*) 2 P. Wms. 162. 1

Sch. and Lefr. 316. 2 Madd.

Rep. 37.

(*g*) 3 Meri. 678.

Affidavit, which must be filed at the Affidavit Office, and an Office Copy taken to read in Court, or to annex to the Petition; and the Order must be drawn up, passed, and entered at the Register Office, and served upon the adverse Clerk in Court, and also upon the Examiner, if the Deposition was taken in Town; or if taken by Commission, upon the Clerk in Court having the Custody of the Deposition, and Office Copies of the Deposition will be delivered out to the Parties. The Order for the Examination, saving all just Exceptions to the Witness, Objections to his Credit or Competency may be taken as in ordinary Cases; but if any Irregularity is discovered, Notice in Writing, in the first Instance, must be served upon the adverse Clerk in Court to discharge the Order for Publication, supported by an Affidavit of the Grounds of Objection; and if the Order should be discharged, the Deposition cannot be read in Evidence: it is too late at the Hearing of the Cause to object to the Irregularity of a Deposition taken *de bene esse* (a); but where the Interval is short between the Publication and the Hearing, the Court will grant Time to examine whether the Deposition was irregularly taken (b).

Depositions have been *amended before and after Publication*, where it was clearly shown that the Examiner had made a Mistake in taking down the Deposition, or the Witness in making it (c): and even after a Decree, a re-Examination has been allowed, not as of course, but at the Discretion of the Court, on Special Application (d). But there are Cases where Leave to amend has been refused; and modern Decisions are against the Practice (e); and the

(a) Atk. 190.

(d) 3 Bro. C. C. 370. 17

(b) 1 Swanst. 171. 1 Wils. Ves. 434.

Ch. Rep. 153.

(e) 5 Ves. 297. 13 Ves. 511.

(c) 2 P. Wms. 426. 646. 4 Bro. C. C. 540. 2 Vern.
 1 Cox. 281. 1 Ves. 398. 285. 435. Dick. 22. 358. 1 Meri.
 Dick. 677. 750. 2 Madd. 130. 3 Anstr. 835.

Rep. 322.

Court has given Leave to re-examine a Witness upon the same Interrogatories *before* Publication, that he might answer more fully (*a*). And even *after* Publication at the Instance of the Witness (*b*), but not to put in a new Examination (*c*); and Interrogatories have been, by Order, allowed to be filed for such Purpose; but an Order must be obtained, whether it be by the Examiner, or by Commission; and in some Cases the Master is directed to settle the Interrogatories, upon the usual Affidavit by the Party, his Clerk in Court and Solicitor denying all Knowledge of the former Depositions: and if it should be allowed, it would be open to a Cross-examination by the opposite Party, and also an Examination of Witnesses at large (*d*). If a renewed Commission to examine Witnesses should be obtained, the Party applying must bear the Coets and Charges, unless the opposite Party examines Witnesses, of those he pays the Expences; but if a Party joins in Commission, and has Commissioners present at the Execution, although he examines no Witnesses, the Court will not grant a new Commission even upon the usual Affidavit (*e*), unless Publication has passed prematurely, though the Party may have consented to accommodate the other Side (*f*). But where one Party has examined Witnesses, and the other none, before or after Publication, he may as of course obtain an Order for a Commission to examine Witnesses; but, in the latter Case, it must be upon the usual Affidavit of not knowing the Contents of the Depositions.

Where Leave was given by a Decree to exhibit Interrogatories, to prove a Will of real Estate which had been only proved as to personal, the Depositions could not be published without an Order for that Purpose (*g*).

(*a*) 13 Ves. 280.

(*b*) 5 Ves. 297. 1 Cox. 281.

(*c*) 13 Ves. 285.

(*d*) 1 Vern. 253.

(*e*) Dick. 18.

(*f*) 8 Ves. 315.

(*g*) 2 Madd. Rep. 165.

Ham. Dig. 454.

It may be convenient to close this Head with some Observations on the Purity and Regularity of the Interrogatories and Depositions, and the incidental Proceedings. The Publication of the Evidence will afford an Opportunity of considering in what respect the Interrogatories may be objectionable, as *leading*, or with the Depositions *scandalous and impertinent*: the Office-Copy of the Depositions always includes the Interrogatories upon which the Depositions have been taken. The junior Practiser would act very prudently were he to submit them to the Consideration of Counsel, before he commenced any Proceedings for the above Purposes. And it may be useful further to remark, that as the Interrogatories are never abbreviated for Counsel, it is the Province of the Solicitor exclusively, to consider the Regularity of the Interrogatories; in many Instances they deserve very serious Attention. To inquire into any of these Defects,

The Course of Practice is to apply by Motion as of course, without Notice (*a*), or by Petition to the Master of the Rolls for an Order to refer the Interrogatories and Depositions to one of the Masters to look into the Proceedings, and see if they are leading, scandalous or impertinent: the Order must be drawn up, passed, and entered at the Register Office, and a Copy served upon the adverse Clerk in Court, at his Seat in the Six Clerks Office; and the Order, with the Office Copy of the Interrogatories and Depositions left at the Master's Office to whom the Reference is made: a Warrant on leaving is not issued; a Warrant is taken out to proceed on the Interrogatories and Depositions. A correct Copy of this and all other Warrants, with the Notice at the Foot, must be served upon the Clerk in Court for the adverse Party, or on his Agent or Copying Clerk, at his Seat in the Six Clerks' Office: each Warrant must be served two Days before the Day of Attendance, as on Monday for Wednesday, and on Saturday for

(*a*) 12 Vos. 201.

Tuesday; and at the Return of any Warrant, successive Warrants to proceed upon the Reference must be taken out and served, and attended. And if the Attendance of Counsel should be advisable, proper Instructions for that Purpose must be prepared: if the adverse Solicitor does not attend after three Warrants have been regularly taken out and served, and the Due and Regular Service of them sworn to and indorsed on the last Warrant, the Master will state that Fact in his Certificate, and proceed on the Matters referred *ex-parte*; if the adverse Solicitor attends the Warrants, the Master will proceed on hearing both Parties, and make his Certificate upon the Matters referred. This Certificate, though in the Nature of a Report, requires no Confirmation by the Court: Objections do not lie, but Exceptions may be filed in the first Instance, as in the ordinary Course of Exceptions to Answers. The Certificate signed by the Master is usually taken by the Party in whose Favour the Reference turns; and must be filed at the Report Office, and an Office Copy of the Report taken to read in Court before any further Proceeding can be instituted (a). If the Master certifies the Interrogatories to be *leading*, or both Interrogatories and Depositions to be *scandalous* and *impertinent*, if either Party should be dissatisfied with the Decision of the Master, he may file Exceptions to the Certificate; these Exceptions must be signed by Counsel, and ingrossed on five Shillings stamped Paper, and filed with Mr. Bird, at the Register Office, and a Deposit made of £5, and 1s. paid for the Certificate, which must be annexed to a Petition to the Lord Chancellor, and left with Mr. Farrer, his Lordship's Secretary, for an Order to set down the Exceptions for hearing, and the Order drawn up, passed, and entered, at the Register Office, served upon the adverse Clerk in Court, and the Exceptions set down with the Register; and unless they are set down to be heard, the *mere filing* the Exceptions will not prevent

(a) 2 P. Wms. 517.

the adverse Party from proceeding upon the Certificate (a). The Proceeding upon Exceptions will be found in a subsequent Part of this Work : see Title “ *Exceptions.*” If no Exceptions should be filed to the Certificate, Instructions must be given to Counsel to move upon Notice, that the Interrogatories or Depositions, or such Parts of each as the Master has certified to be leading, or scandalous, or impertinent, may be suppressed, which the Court will direct upon hearing the Certificate, and will order accordingly : the Order must be drawn up, passed, and entered at the Register Office, and served upon the adverse Clerk in Court ; and the Depositions, or such of them as the Order extends to, will not be suffered to be read at the Hearing. The Order for suppressing the Depositions should be served upon the Examiner, if the repudiated Deposition was taken in Town, or upon the Clerk in Court making out the Commission for the Examination of Witnesses, into whose Custody the suppressed Deposition has been returned ; and the Order should be annexed thereto : and the Clerks in Court for all Parties interested, should take care that, according to ancient Practice, the suppressed Deposition be inscribed, *Suppressed by Order, dated, &c.*, setting their Signatures thereto. But it should seem that if only one Interrogatory be reported leading ; the Deposition to that particular Interrogatory only would be suppressed. And in like manner, if Part only of an Interrogatory should be reported leading, scandalous, or impertinent, so much of the correspondent Deposition as refers to and answers the leading Question, would be suppressed (b) : though a Reference for Scandal is of course (c), the Court will not refer Interrogatories and Depositions for Impertinence alone, without Scandal (d) ; where Depositions are suppressed, they would be opened, in a Case of Necessity ; as if the Witness could not be examined again (e) ; and the

(a) Dick. 604. 4 Ves. 617. (d) 19 Ves. 113.

(b) 2 Ves. j. 189.

(e) 15 Ves. 380.

(c) 12 Ves. 201.

Court will, under Circumstances, allow an Application for Leave to exhibit new Interrogatories for the Examination of the same Witnesses (*a*), to be settled by the Master, as in the Instance of an Interrogatory framed without any improper Design, though reported leading (*b*) ; but though the Interrogatory may be free from Objection, if the Deposition be reported scandalous or impertinent, the Court will make an Order to suppress the Deposition (*c*). And where Depositions have been suppressed for Want of Notice until after Publication, and the Omission has been accounted for, an Option has been given to re-examine the same Witnesses, or to allow the Depositions to stand, with liberty on the other Side to cross-examine those Witnesses, and to examine others (*d*). It should seem that if the Interval between publishing the Deposition and the Hearing of the Cause is short, the Court, upon Motion, will grant Time to examine, whether the Depositions published have been regularly taken (*e*). Where a Commission to examine Witnesses abroad had been executed and returned, and the Defendant not being prepared with Interrogatories to cross-examine, a new Commission was granted upon Defendant's stating whom he wished and undertook to examine ; the Court, however, refused to suppress the Plaintiff's Depositions (*f*) : but it does not seem necessary that Publication should have passed, Depositions have been suppressed *before* Publication ; as in the Instance of a Witness during her Examination using Minutes in Writing originally her own, but put into Method by an Attorney for one of the Parties, and copied by herself, her Deposition was suppressed (*g*) : in whatever Way the Knowledge of such a Fact reaches the Court, whether from a Commissioner, who

(*a*) 3 Anstr 923. 2 Swanst.
264.

(*b*) Ambl. 585. 1 Eq. Ca. 1 Swanst. 166.
Abr. 232. Dick. 22.

(*c*) 2 Atk. 234.

(*d*) 2 Meri. 81.

(*e*) 1 Wils. Ch. Rep. 155.

(*f*) 19 Ves. 552. 556.

(*g*) 15 Ves. 381.

is not incompetent to disclose it, or from an Eaves-Dropper, the Court, having the Fact before it, must act upon it (*a*). A Witness is not allowed to give in Evidence an Answer prepared before his Examination, nor is any Suggestion to the Witness by Counsel, or an Attorney, or any other Person, to be permitted; in all these Cases the Depositions would be suppressed: the Employment of a Clerk of one of the Parties in the Cause, as Clerk to the Commissioners executing the Commission, has been held a sufficient Ground to suppress the Depositions; *à fortiori*, a Clerk to the Attorney of one of the Parties in the Cause suffered to act as Clerk to the Commissioner, in taking and transcribing the Depositions (*b*); so, where the Solicitor of one of the Parties, or his Clerk, acts as one of the Commissioners (*c*). An acting Commissioner, if a Witness, must be examined before any other Witness, otherwise his Deposition will be suppressed (*d*). If a Person interested in the Suit should not be objected to upon his Examination, if at the Hearing it should appear upon the face of the Deposition that he is interested, his Deposition will be suppressed (*e*).

Depositions of Witnesses taken by Commission abroad upon Parchment or Paper not duly stamped, will, by Order, on Motion or Petition, as of course, be directed to be taken by the Clerk in Court to the Stamp Office to be stamped, and that such as are taken upon Paper be ingrossed upon Parchment duly stamped (*f*), before the Office Copies of the Depositions can be delivered out. Depositions taken in like Manner in a Foreign Language, must be translated into English, by Order obtained as of course, upon Motion or Petition to the Rolls, appointing some Person by Name, generally a Notary Public, to translate the Depositions, and to be sworn to the true

(*a*) 15 Ves. 381.

(*d*) 2 Ch. Ca. 79.

(*b*) 4 Madd. 380. Ambl.

(*e*) Gwill. 1255.

252. 2 Ves. and Bea. 406.

(*f*) 2 Cox Rep. 190. 426.

(*c*) Dick. 563, 793.

Translation thereof, and also that it may be read at the Hearing of the Cause; the Translation must be afterwards ingrossed upon Parchment, with proper Stamps, and annexed to the original Deposition, and the Translation, with the original Deposition, taken to the Sitting Master, at the Public Office, in Southampton Buildings, or to any other Master in his Absence, who, upon the Production of the Order, will swear the Translator thereto. An Office Copy of the Translation must be obtained from the Clerk in Court; and at the Hearing, upon Production of the Order for reading the Translation, the Office Copy will be allowed to be read in Evidence: but it seems that the Court will not part with the original Deposition out of the Office for the Purpose of Translation (a). Where a Foreign Witness is to be examined, the more regular Course would be to apply for an Order for the Commissioners, at the Execution of the Commission, to be at liberty to swear an Interpreter to turn the Answers of a Foreign Witness into English, and so to take them down and return them (b).

The Cause may be set down to be heard, upon Bill and Answer, on the Days appointed for setting down Causes; and if a Replication has been filed, and Rules to pass Publication entered, the Cause may be set down in the Term next after Publication; but it cannot be set down in the same Term Publication passes, unless by Special Order upon Consent of all Parties (c). If the Plaintiff neglects setting down the Cause for Hearing the next Term after Publication has passed, it may be set down at the Request of the Defendant in the Term after, to recover his Costs (d): and in Injunction Causes, the Defendant is at liberty to apply to set down the Cause the Term next after Publication has passed. The Cause may be set down *before Pub-*

(a) 7 Ves. 292.

(d) 2 P. Wms. 424. Ord.

(b) 2 Cox Rep. 288.

Canc. Bea. 334. 337. 2 Ves.

(c) Ord. Canc. Bea. 319. 23.

5 Madd. 83.

lication has passed, if Publication has been enlarged at the Instance of the Defendant upon the Terms of not hindering the Plaintiff from setting down his Cause (*a*). But where a Plaintiff had enlarged Publication, and before the Time for Publication had expired, set down the Cause for hearing, and issued a Subpœna to hear Judgment, the Subpœna was upon Motion, quashed, and the Cause struck out of the Paper, with Costs (*b*).

The Cause may be set down before the Lord Chancellor, or the Master of the Rolls; the Causes set down in the Lord Chancellor's *General Paper of Causes* are heard by the Vice Chancellor, but the Lord Chancellor may, in his Discretion, give Directions for a Cause to be heard before himself. An Application to set a Cause down on an early Day, must be made by Petition (*c*); but in Causes involving no Question of Difficulty, and not likely to take up much Time in Argument, and where the Subject-Matter would authorize the Court to make a Decree as of course: the Cause, upon the Application of Counsel, may be of course advanced in the General Paper of Causes, and heard out of its Turn as a *Short Cause*, and the Register will put it into that Paper: for disposing of these Causes a Day is usually appointed in the Term for hearing *Short Causes*; but the Court will not suffer itself to be taken by Surprise, where a Cause set down as a Short Cause, occupied a considerable Time in Argument, the Court ordered it to be postponed till after the other Short Causes, and farther intimated that in future such Causes would be restored to their original Places (*d*). So where a Bill of Foreclosure had been ordered as of course to be set down as a Short Cause, the Court held that it could not be done unless by Consent, and struck it out of the Paper of Short Causes (*e*). In amicable Suits, where all the Parties consent to a Decree being

(*a*) Dick. 493.

(*d*) 1 Ja. and Wa. 1. n.

(*b*) 4 Madd. 126. 5 Madd. 83.

(*e*) 2 Madd. 147.

(*c*) 1 Bro. C. C. 56.

made as of course, and to attend the Hearing *gratis*: the Cause may be set down before the Master of the Rolls, with his Secretary, in the Paper of *Consent Causes*, upon the Days appointed for those Causes, at nine o'clock in the Morning at the Rolls: it should seem that a Cause may be referred for Irregularity in setting down, even after a Decree (*a*).

The Six Clerks, by ancient Privilege, are intitled to set down a limited Number of Causes for hearing, of which they give Notice to the Clerks in Court, in their respective Divisions. If the Cause is to be set down by the Six Clerks, the Solicitor must give Instructions to his Clerk in Court the Day before the Third Seal after Hilary, Trinity, and Michaelmas Terms; and in the Short Vacation after Easter Term, on or before the last Day of that Term, or before the Seal preceding Trinity Term; the Instructions should express the Title of the Cause, the Names of the Plaintiffs and Defendants, and the Object of the Suit, and before whom it is intended to be heard, in Court or at the Rolls: if the Six Clerks' List of Causes should be full, the Cause must be set down with the Register: the Lord Chancellor's Senior Register has the personal Privilege of setting down eight Causes, and the Senior Register of the Master of the Rolls, six Causes (*b*). To set a Cause down upon Bill and Answer with the Register, the Solicitor must obtain from his Clerk in Court, the Six Clerk's Certificate in Writing, that the Pleadings have been filed: but if Witnesses have been examined, or Rules to pass Publication entered, the Six Clerk's Certificate that Publication has passed in the Cause: if the Clerk in Court sets down the Cause, he will obtain the Register's Note in Writing of the Cause being set down, and the Subpœna to hear Judgment, or he will send the Register's Note to the Solicitor for that Purpose; if the Solicitor sets down the Cause, he must obtain from his Clerk in Court the Six Clerk's Certificate, upon Production of which to the Register, he will enter the Cause

(*a*) Mosc. 44.

(*b*) Com. Rep. of Fees, p. 32.

for hearing in his General Cause-Book, after the Six Clerks Causes; and give the usual Note for the Purpose of obtaining a Subpoena to hear Judgment, without which it cannot be obtained (a). If the Registers have set down their allotted Number, the Cause must be set down with the Lord Chancellor's Secretary, Mr. Farrer, in Lincoln's Inn Fields. Previous to the Year 1783, it was the Practice to present Petitions to set down Causes with the Secretary, on which Orders were made: from that Period the Practice of petitioning was discontinued;* and the Cause is now set down on Production of the usual Certificate of the Pleadings being filed, or Publication passed, to the Secretary without any Order, or to the Register.

The Subpoena to hear Judgment must be issued by the Party setting down the Cause, by leaving a Præcipe in the following Form, with the Register's Note annexed, at the Subpoena Office, in the Rolls Yard.

(a) Ord. Canc. Bea. 46, 50.

* The following Notice was sent by Mr. Dickens, the Senior Register, and affixed in the Six Clerks' Office, and the Register Office:

"Mr. Dickens has the Lord Chancellor's Orders to signify to the Gentlemen of the Six Clerks' Office, and other Practisers of the Court of Chancery, that His Lordship has been informed that it is the Custom to set down Causes to be heard before the Master of the Rolls, upon producing to his Secretary a Certificate of the Six Clerk, of the Pleadings; but that to set down a Cause to be heard before the Lord Chancellor, it hath been usual to present a Petition for that Purpose.

"His Lordship to save that Expence to the Suitors which he thinks unnecessary, hath ordered his Secretary in future to set down all Causes that shall be brought to him, in the same Manner as is done at the Rolls, without a Petition for that Purpose, as hath hitherto been the Custom.

17th March, 1783.

"To the Gentlemen of the Six Clerks' Office.

"Ex. Autograph. J. Dickens, D. Reg. pence Editoris."

“ Subpœna for George Wilson, William Wilson, and
 “ Stephen Lawrence, to appear in Chancery, return-
 “ able the 20th Day of January, to hear Judgment,
 “ on the 23d Day of January instant (*the Time*
 “ *mentioned in the Register's Note*) at the Suit of
 “ John Lawrence and others.

“ January 8th, 1820.

“ Kensit, Solicitor.”

This Writ is always made returnable in Term, three clear Days before the Day the Cause is set down to be heard; Sunday is *dies non juridicus*; if there should not be three Days it must be returnable on a General Return-Day (*a*); as in the Instance of a Cause set down for the first Day of Causes in Hilary Term; the Subpœna must be made returnable in eight Days of St. Hilary to hear Judgment the 24th of January; only three Defendants can be included in one Subpœna; if there are more, several Præcipes for every three Defendants must be made out for each Writ. The like Instructions for Service of the Subpœna must be observed, as for a Subpœna to appear and answer (*b*). The Labels must be served personally, shewing the Original Writ at the same Time; and the Body of the Subpœna, left under Seal at the House of the Defendant with one of his Family (*c*). If the Defendants live in Town, or within twenty Miles, they must be severally served ten Days exclusive at least before the Time mentioned in the Writ to hear Judgment. If the Defendants reside above twenty Miles from London, the Service must be fourteen Days exclusive before the Day to hear Judgment, except in the Vacation between Easter and Trinity Terms, then ten Days only (*d*). Service of a Subpœna, to hear Judgment *personally* on an Infant, is not good; it must be upon the Guardian *ad litem* (*e*).

Where a Defendant is abroad, or absconds, or cannot

(*a*) Prac. Reg. Wy. Ed. 410.

(*d*) Ord. Canc. Bea. Ed. 170.

(*b*) Ant. 105.

(*e*) Dick. 439. 2 P. Wms.

(*c*) Ord. Canc. Bea. 170, 171. 643.

be found, and his Solicitor and Clerk in Court refuse to receive the Writ, or to undertake to appear for him at the Hearing of the Cause ; Enquiry should be made of his Solicitor, and of his Clerk in Court, where the Defendant is to be met with, in order that the Subpœna may be served on him. If they refuse, or are unable to give the Information required, or the Clerk in Court cannot be found, or no Person attends his Seat in the Chancery Office, on Application by Motion in Court, or by Petition to the Master of the Rolls, grounded on an Affidavit of the Facts, an Order will be made, that Service of the Subpœna on the Defendant's Solicitor be deemed good Service on the Defendant, and a Copy of the Order left at his last Place of Abode. See Titles "*Petition*," and "*Affidavit*." The Petition, answered at the Rolls, must be left at Mr. Bird's Seat, in the Register Office, and the Order, entered and passed, and a Copy thereof, with the Subpœna, served *personally* on the Clerk in Court, if found, or upon the Solicitor, shewing the Original Order passed and entered, and a Copy of the Order left with some Person at the last Place of the Party's Abode (a).

In a Suit against Husband and Wife, for Relief against the separate Estate of the Wife, she must be served with a Subpœna to hear Judgment (b). The Party at whose Instance a Cause has been set down for Hearing, would act prudently in being prepared with an Affidavit of Service of Subpœna to hear Judgment to read, if the adverse Party should make Default at the Hearing : a Plaintiff neglecting such Precaution, would not be entitled to a Decree *nisi* against the Defendant ; nor can a Defendant have the Bill dismissed unless he can shew by Affidavit that he has been served with Subpœna to hear Judgment. If the Defendant is not served with a Subpœna to hear Judgment, and the Plaintiff does not proceed, the Cause is struck out of the Paper, without Costs to either Party. Service of

(a) 2 Ves. 23.

(b) 9 Ves. 486.

Subpœna to hear Judgment is necessary, though a Cause is set down under a peremptory Undertaking to speed the Cause (*a*); but a peremptory Undertaking to appear has been held equivalent to serving a Subpœna to hear Judgment, and to dismiss the Bill with Costs (*b*). And if one of two Defendants sets down a Cause, it is only necessary for him to serve Plaintiff with a Subpœna to hear Judgment: it is the Duty of the Plaintiff to serve the other Defendant (*c*). Where a Cause was set down, and a Subpœna to hear Judgment served, and afterwards the Plaintiff died, and the Suit was revived, it was held not necessary to serve new Subpœnas to hear Judgment (*d*); and so, after the Death of the Defendant, the Court seemed to think it was not necessary (*e*).

When all the Defendants are served with Subpœnas to hear Judgment, an Affidavit of the Service must be made and filed at the Affidavit Office, in Symond's Inn, and an Office Copy taken to read at the Hearing of the Cause, in Case any of the Defendants make Default in Appearance. And if Publication should have been enlarged beyond the Day on which the Cause is set down for hearing, an Order should be obtained, by Motion or Petition as of course, to adjourn the Cause, otherwise, if called on, it would be struck out of the Paper: the Order must be served upon the adverse Clerk in Court, and the Cause marked *adjourned*, by the Register, in his Book of Causes.

The Solicitor should search the Book of Causes at the Register-Office, which is open for the Inspection of Solicitors, in Office Hours, to inform himself how the Cause stands.

(*a*) 18 Ves. 520.

(*b*) 17 Ves. 130.

(*c*) 5 Madd. 474.

(*d*) 6 Madd. 72.

(*e*) 5 Ves. 305.

HILARY TERM. 1821.

If, in any Stage of the Proceedings, the *Property or Right* in Litigation, vested in the *Plaintiff*, be transferred to another by *Deed or Operation of Law*, the Person to whom it is transmitted, is entitled to supply the Defect of the Suit if it become defective merely, and to continue it, or at least to have the Benefit of it, if abated: so, if any Property or Right before vested in the *Defendant*, becomes transmitted to another, the Plaintiff is entitled to render the Suit perfect, if become defective, or to continue it, if abated, against the Person to whom that Property is transmitted (*a*). Where the Imperfection arises from a Defect in the Original Bill, or in some of the Proceedings upon it, or in respect of new Evidence discovered, or of some Event occurring subsequent to the Filing of the Original Bill, which gives a new Interest in the Matters in dispute to a Person who is not a Party to the Bill; the Defect may be supplied by a *Supplemental Bill*, which is merely an Addition to the Original Bill, and is generally filed for the Purpose of bringing before the Court, some Event which has arisen subsequent to the filing of the Original Bill (*b*); but it should seem that the mere Circumstance of a *relevant* Event, happening subsequent to the Original Bill, is not sufficient to warrant a Supplemental Bill, unless such Event be *material* (*c*): where there is no Alteration in the Interest of the Parties, nor any particular Circumstances requiring further Discovery, and a Fact only has occurred which might be proved or taken on the Account prayed by the Original Bill, and the Relief is not varied by the Supplemental Matter, but the same Relief may be obtained

(*a*) Red. Tr. Ch. 48.(*c*) 17 Ves. 144. 2 Madd.(*b*) Coop. Pl. 73. 3 Atk. Rep. 385.

217. 1 Atk. 291. Red. Tr.

Ch. 50.

under the Original, as by the Supplemental Bill, the Court has held a Supplemental Bill to be improper (*a*); so where an Answer stated certain Facts which had arisen subsequent to the Filing the Original Bill, the Plaintiff was allowed to put these Facts in issue, by an Amendment of the Original Bill (*b*): and it may not be improper here to remark generally, that wherever the same End may be obtained by Amendment, the Court will not permit a Supplemental Bill to be filed (*c*); as in the Instance of a Supplemental Bill brought against a Person, praying that he might answer the Original Bill, to which he had not been made a Party; unless a satisfactory Reason can be shewn that he could not be made a Party by Amendment of the Original Bill, the Defendant may avail himself of the Irregularity by Demurrer (*d*). If a Supplemental Bill be brought on Matter which arose before the Original Bill was filed, and this is not apparent on the Bill, the Defendant may plead the Fact (*e*). If a Bill be amended by stating a Matter which has arisen subsequent to the Filing the Original Bill, and which consequently ought to have been the Subject of a Supplemental Bill, advantage may be taken of the Irregularity, by way of Plea, if it does not sufficiently appear on the Bill to found a Demurrer; but if the Defendant should unwarily answer, he waives the Irregularity, and cannot make it at the Hearing (*f*). It may be useful further to observe, that a Supplemental Bill, merely introducing Matter to sustain the Relief sought by the same Plaintiff from the same Defendant, by the Original Bill, is not in all cases a Supplemental Suit; where there is only one Record, and one Cause to be set down to be heard (*g*).

(*a*) 2 Madd. Rep. 61.

(*e*) Beam. Pleas, 302.

(*b*) 1 Madd. Rep. 566.

(*f*) Red. Tr. Ch. 165. 234.

2 Madd. Rep. 385.

Coop. Pl. 303. Beam. Pleas,

(*c*) Red. Tr. Ch. 49. Coop. 302.

Pl. 75. 214.

(*g*) 5 Madd. Rep. 427.

(*d*) 3 Atk. 216. 817. 2 Atk.

40.

The Noble and Learned Author so often referred to, has stated that the Cases in which a Supplemental Bill may be proper, are to *add Parties* where Amendment is not allowable by the Rules of the Court (*a*); or to obtain a further Discovery, or to put new Matter in issue, which may be done as well after as before a Decree (*b*): and the Bill may be in aid of a Decree, for the Discovery of further Evidence, touching a Matter of Account; but it should be observed that where a Supplemental Bill is brought after Publication, it is irregular to examine Witnesses to a Matter in issue, and not proved in the Original Cause; if taken it would not be read in Evidence; and if there be no Proof as to the new Matter in the Supplemental Bill, it will be dismissed (*c*). A Supplemental Bill may be brought after a Decree that it may be carried more fully into Execution; as on a Decree to account, for want of full Directions before, and Directions are usually given under the Supplemental Bill, that the new Matter should be connected with the former Decree: or that proper Directions may be given upon some Matter omitted in the Original Bill (*d*), or not put in issue by it, or by the Defence made to it (*e*); or it may be to bring formal Parties before the Court (*f*), or to impeach the Decree (*g*), which is the peculiar Object of a Supplemental Bill, in the nature of a Bill of Revivor (*h*). When any Event happens subsequent to the filing an Original Bill, which gives a new Interest in the Matter in dispute to any Person not a Party to the Bill, as the Birth of a Tenant in Tail; or the happening of any other Contingency (*i*), or which occasions any Alteration in the Interest of any of the Parties to the Suit, and does not deprive a Party suing

(*a*) 3 Atk. 370. 817. Cowp.
Pl. 74.

(*b*) 2 Ch. Rep. 75.

(*c*) 4 Vin. Abr. 439. 2 Eq.
Ca. Abr. 173. 6 Bro. P. C. 86.

(*d*) 3 Atk. 133.

(*e*) 3 Atk. 110.

(*f*) 3 Atk. 217.

(*g*) 1 Ves. jun. 405.

(*h*) Red. Tr. Ch. 49.

(*i*) Red. Tr. Ch. 49. 1 Atk.
291. 3 Atk. 217.

in his own Right, of his own Interest in the Subject ; as in the Case of a Mortgage, or any other partial Change of Interest ; or if a Plaintiff, suing in his own Right, is entirely deprived of his Interest, but he is not the sole Plaintiff, the Defect may be supplied by Supplemental Bill (*a*), which, though Supplemental in respect of the old Parties, and the Rest of the Suit, yet to any new Party brought before the Court, in regard to its immediate Operation, has in some degree the Effect of an Original Bill. If the Interest of a Plaintiff, suing in *auter droit*, entirely determines by Death or otherwise, and some other Person becomes entitled to the same Property under the same Title ; as in the Case of Assignees of a Bankrupt, upon Death or Removal (*b*) ; or of an Executor or Administrator, upon the Determination of a limited Administration (*c*) : in these Cases there is no Change of Interest but only of the Persons in whose Name the Suit must be prosecuted. Where the Interest of a Defendant is not determined, but only becomes vested in another by an Event subsequent to the Institution of the Suit, as in the Case of an Alienation by Deed, Devise, or by Bankruptcy, or Insolvency ; in all these Cases the Suit may be continued by *Supplemental Bill*, and the new Party is bound by all the Acts of the former Party, and *may* be made liable to all the Costs of the Suit, *ab initio* (*d*). It may not be improper here to remark, that an *Original Bill*, in the nature of a *Supplemental Bill*, would be necessary, where a sole Plaintiff, suing in *his own Right*, is deprived of his whole Interest in the Matters in Question, by an Event subsequent to the Institution of the Suit ; or where the whole Interest of a Defendant is become vested in another by a Title not derived from the former Party ; but the Distinction between the latter Bill

(*a*) 3 Atk. 50.

(*d*) Red. Tr. Ch. 53. 1

(*b*) 1 Atk. 88. 3 Atk. 218. Atk. 89. 5 Madd. 91.

(*c*) Proc. Ch. 175. 2 Vern.

237. 2 Eq. Ca. Abr. 3, 4.

and a Supplemental Bill, as applied to a sole Plaintiff, suing in his own Right, or in *auter droit*, in Cases of Bankruptcy and others, is said to be now disregarded in Practice (a). Where a Plaintiff has become Bankrupt, the Court has made an Order upon Notice, that his Assignees should, within a limited Time, file a Supplemental Bill, in the nature of a Bill of Revivor, or in Default, that the Bill should be dismissed (b). Where a Feme Sole Plaintiff Marries after a Suit commenced, and a Settlement has been made of all her Right and Interest to Trustees for her and her Issue, a Supplemental Bill has been considered necessary (c). And if a Plaintiff becomes a Lunatic, a Supplemental Bill must be filed in the joint Names of the Lunatic and the Committee of the Estate ; so, if a Defendant becomes Lunatic, a Supplemental Bill must be filed against the Lunatic and his Committee, and if the latter be changed, the new Committee will be on Motion substituted as a Defendant (d). A Tenant in Tail, claiming upon the Death of a former Tenant without Issue, not through or under, but in Remainder, may continue the former Suit by Supplemental Bill (e). Where Husband and Wife are Defendants, and by the Death of the Husband a new Interest arises to the Wife, the Suit becomes Defective, and a Supplemental Bill is necessary ; the Wife is not bound by the Answer she put in under Coverture (f).

The Cases in which a Supplemental Bill may be necessary, are detailed at such considerable Length in the Works of the Noble and Learned Judge, and the other Learned Authors so often referred to, that it may be sufficient to conclude by observing, that a Supplemental Bill must state the Original Bill, or rather the Parties and Prayer of it, and the Proceedings thereon ; and if the Supplemental Bill

(a) Coop. Pl. 76. Beam.
Pleas, 301.

(b) 18 Ves. 424. 5 Madd.
80.

(c) 13 Ves. 435.

(d) 2 Madd. Chan. 523.

(e) 9 Ves. 37.

(f) 1 Ja. and Wa. 665.

be occasioned by an Event subsequent to the Original Bill, it must state that Event, and the consequent Alteration with respect to the Parties ; and, in general, the Supplemental Bill must pray, that all the Defendants may appear and answer to the Charges it contains, and that the Plaintiff may have the Benefit of the former Proceedings. If the Supplemental Bill is not for a Discovery merely, the Cause must be heard upon the Supplemental Bill, at the same Time that it is heard upon the Original Bill, if it has not been before heard ; and if the Cause has been before heard, it must be further heard upon the Supplemental Matter (*a*). But a Supplemental Bill, merely introducing Matter to sustain the Relief sought by the same Plaintiff against the same Defendant, by the Original Bill, is not a Supplemental Suit (*b*). If, indeed, the Alteration, or Acquisition of Interest, happens to a Defendant, or a Person necessary to be made a Defendant, the Supplemental Bill may be exhibited by the Plaintiff in the Original Suit, against such Person alone, and may pray a Decree upon the particular Supplemental Matter alledged against that Person only (*c*) ; unless, which is frequently the Case, the Interests of the other Defendants may be affected by that Decree (*d*) ; Where a Supplemental Bill is merely for the Purpose of bringing formal Parties before the Court as Defendants, the Parties, Defendants to the Original Bill, need not in any Case be made Parties to the Supplemental (*e*).

The Necessity of a Supplemental Bill, in the nature of a Bill of Revivor, arises here from a Defendant materially interested becoming a Bankrupt. His Property being then vested in his Assignees, they are entitled to his Interest in the Suit : or, in case the Bill had made any Claim against him, they are entitled to represent him, and to make such Defence against the Claim as they shall be advised ; even

(*a*) 3 Atk. 217. Red. Tr.
Ch. 69.

(*b*) 5 Madd. 427.

(*c*) 3 Atk. 217.

(*d*) Red. Tr. Ch. 70.

(*e*) Coop. Pl. 83.

though such Defence had not been made or insisted on by the Bankrupt himself in his Answer.

The Supplemental Bill, with the requisite Instructions, must be left with Counsel to draw and sign. When finished, it must be engrossed and filed, in the same Manner as an Original Bill ; and the Clerk in Court should be instructed to file it with the same Six Clerk who filed the Original Bill. A Subpœna must be obtained, and served on the Defendants, Parties to this Suit ; and the Proceedings against them will, in every Respect, be similar to the Proceedings which have already been had in the Original Cause, in compelling an Appearance and Answer, and filing a Replication to the Answer, examining Witnesses, &c. &c., which will be found in a former Part of this Work (a).

It may frequently become necessary *to adjourn the Cause* already set down, to a future Day ; but a Cause will not be adjourned when near the Hearing, because a Cross-Bill has been filed, which has not been answered (b) : the Application may be by Motion or Petition ; and in such Case, it is proper that the Clerk in Court for the adverse Party should sign his Consent to the Petition, or the Solicitor should instruct Counsel to consent, if by Motion.

For the Form of the Petition, see “ *Petitions.* ”

The Petition must be presented either to the Lord Chancellor, or to the Master of the Rolls, before whom the Cause is set down. If before the Lord Chancellor, the Petition must be left with his Secretary, Mr. Farrer, Lincoln's Inn Fields. If before the Master of the Rolls, with his Secretary, at his Office, in the Rolls Yard. When answered, the Order must be drawn up thereon, at the Register Office, passed and entered, and served on the Defendants' Clerks in Court. The Register will mark the Cause adjourned in the Cause-Book, at the Time he draws up the Order. When the Answers of the new Defendants come in, if they are full and sufficient, a Replication may be im-

(a) Ant. 103.

(b) 4 Madd. 262.

mediately filed, a Subpoena to rejoin obtained, and served as before directed; and a Rule to produce Witnesses may be given: and if no further Evidence should be required, and the Cause in such a state of forwardness in the Cause-Book, as to be heard in the Term, Publication may pass by Consent, if the Solicitor for the new Defendants will agree to it. This Consent is given by the Clerks in Court signing the Rule-Book, in the Six Clerks' Office. If the Defendants' Solicitor should not consent, and the Cause is likely to be called on to be heard before Publication can pass, an Application must be made to adjourn the Cause; the Cause would otherwise be called on, and struck out of the Paper, and must be again set down. It may be useful to remark, if the Adjournment is for the Purpose of an amicable Arrangement of the Matters in dispute: that where the Subject Matter has been disposed of out of Court, the Cause will not be heard merely for the Purpose of disposing of the Costs (a); Terms of Compromise of a Suit, and of an Action at Law, agreed upon out of Court, and afterwards disregarded, being no part of the Suit, the Court has no Jurisdiction to enforce (b).

Preparatory to the Hearing, it may be of use to address to the junior Practisers a few Observations upon the general Rules and Principles of Evidence: the Admissibility of Witnesses, and of Evidence, positive and presumptive.

The Rules of Evidence in Courts of Equity are in general the same as in Courts of Law; from the different Modes of Proceeding in the two Jurisdictions, diversities must necessarily arise: for the Purpose of directing the Testimony of Witnesses, certain general Rules have been established; one of these is, *that the Evidence which either Party produces, ought to be confined to the Points in issue.* A distinguished Author has laid this down as an universal Principle or Axiom, which admits of no Exception. Every Proof ought to bear directly or indirectly upon the Facts in

(a) 1 Sim. and Stu. 39.

(b) 5 Madd. 78.

dispute (a). Depositions, therefore, to a Fact not in issue, or not supported by an Allegation in the Bill, cannot be read in Evidence (b); nor will any Notice be taken of Evidence introductory of a Defence, differing from that made by the Answer (c). Under the general Charges in the Bill, particular Evidence may be gone into, in support of a general Charge; but under a Charge of Misbehaviour in a Wife, Proof of Adultery has been refused (d).

Another general Rule of Evidence is, *that the Affirmative of the Issue is to be proved*, according to the Civil Law Maxim, *ei incumbit probatio qui dicit, non qui negat* (e): this relates to the Person who is to prove the Issue, and casts the Burthen of Proof upon the affirming Party. Where one Party charges another with a culpable Omission, or Breach of Duty, this general Rule does not apply; the Person who makes the Charge is bound to prove it, though it may involve a Negative; a Person is not presumed to have acted illegally until the contrary is proved (f). Where the Presumption of Law is in favour of the Defendant, it will be incumbent on the Plaintiff to disprove it, though, in so doing, he may have to prove a Negative. In a Question of Legitimacy, if a legal Marriage is proved, the Legitimacy is presumed; and the Party who asserts the Illegitimacy, ought to prove it; but if there has been a Divorce *a mensâ et thoro*, the Presumption is, that a Child born afterwards, beyond the Time of Gestation, is illegitimate; it would be sufficient, therefore, to prove the Divorce; this would put the opposite Party to establish the Legitimacy by Proof of Access (g). Where the Issue is upon the Life

(a) 1 Phil. Evid. 145.

(d) 2 Atk. 97. 338. 2 P.

(b) 11 Ves. 240. 1 Vern.
484. 2 Atk. 333. 19 Ves.
600.

Wms. 269.

(e) Justin. Pand. Lib. 22
Tit. 3. 1 Phil. Evid. 185.

(c) 12 Ves. 480. 2 Ridg.
P. C. 504.

(f) 3 East. 199. 2 Bl.
Rep. 851. Bull. N. P. 298.

(g) 1 Salk. 123.

or Death of a Person the Proof of the Fact lies upon the Party who asserts the Death; for the Presumption is, that the Party continues alive, until the contrary be proved (*a*): but where no account can be given of the Person, it has been held that this Presumption of the Duration of Life ceases at the Expiration of seven Years from the Time he was last known to be living (*b*), a Period which has been fixed from analogy to the Statute of Bigamy (*c*), and the Statute concerning Leases determinable on Lives (*d*): the general Rule is, that the Burthen of Proof lies on the Person who is to support his Case by Proof of a Fact within his own Knowledge, or of which he is supposed to be cognizant (*e*).

The next General Rule is, that *the best Evidence the Nature of the Case will admit of must be produced*; for if it appear that better Evidence might have been brought forward, the very Circumstance of its being withheld, furnishes a well-grounded Suspicion that it would have prejudiced the Party in whose favour it is, had he produced it (*f*): as in the Instance of a Party offering the Copy of a Deed or Will, where he ought to produce the Original; this raises a Presumption, that there is something in the Deed or Will which, if produced, would make against the Party, and therefore the Copy, in such a Case, is not Evidence; but if he prove the Original Deed or Will to be in the Hands of the adverse Party, who refuses to produce it, after regular Notice given for that Purpose, or that the Original has been lost or destroyed, without his Default, no such Presumption can reasonably be made, and a Copy will be admitted, because then such Copy is the *best Evidence* that can be pro-

(*a*) 1 Phil. Evid. 193. 2
East. 312. 6 T. R. 57.

(*b*) 6 East. 80. 85. 4 Barn.
and Ald. 434. 1 Bl. Rep. 404.

(*c*) 1 Ja. 1. c. 11. s. 2.

(*d*) 19 Car. 2. c. 6.

(*e*) 4 Barn. and Ald. 140.
5 Maul. and Sel. 211.

(*f*) Gilb. Ev. 13. Peake's
Ev. 3. Ball. N. P. 293. 3
East. 193. 201. 1 Phil. Ev.
225.

duced (a). So, to prove the Contents of a registered Deed in the Defendant's possession, the Memorial of the Deed, or other *secondary* Evidence, would not be admissible, unless there had been previously a Notice given to the Defendant to produce the Original (b); but although the best Evidence is to be given, yet the *strongest possible* Assurance of a Fact is not required: where a Deed is attested by several subscribing Witnesses, the Execution may be proved by one of them; or if none of them can be produced, Proof of the Signature of one Witness will be sufficient (c). The Rule is sometimes dispensed with from Principles of Public Convenience: to prove an Entry in a *Public Book*, where the Original is of a Public Nature, and admissible in Evidence, an *examined Copy* will be admitted (d); and an *Admission of a Fact* has been held sufficient to dispense with strict and regular Proof: where a Lessee has admitted that he has assigned his Lease to another Person, this has been held Evidence against him of his having transferred all his Interest in the Premises, though an Assignment can only be effected by an Instrument in Writing (e).

Another Rule, usually classed among the general Rules of Evidence, relating to the Medium of Proof is, that *Hearsay of a Fact is not Evidence*; for if the Speaker be living it is not the best Evidence, but from the great Difficulty of proving remote Facts in the ordinary Manner, by living Witnesses, the Courts have varied from the strict Rules of Evidence applicable to modern Facts (f); and on this principle Hearsay Evidence has been admitted to confirm another's Testimony; and in Cases incapable of *direct and positive Proof*, and which depend only on *Reputation*: of

(a) 1 Phill. Evid. 219. 3 Peake N. P. 30. 2 Dougl. Campb. 499. 593. 4 Taunt. 787.

(b) 2 Esp. N. P. 548.

(e) 2 Starkie N. P. 230.

(c) 1 Phill. Ev. 221. Peake Stat. 29. Car. 2. c. 3.
Ev. 9. 1 East. 460.

(f) 1 Phil. Evid.

(d) Skin. 583. Cowp. 17.

this kind are Questions of *Pedigree, Prescription, or Custom*, and Cases of Legitimacy or the State of a Family. On a Question of Legitimacy, or the State of a Family, the Declarations of deceased Persons, supposed to have been married, are admissible to prove the Fact of Marriage (*a*); and whether a Person was born before or after Marriage; but not to prove a Child born during the Marriage, illegitimate for Want of Access (*b*). Declarations of deceased Members of a Family have been received to prove Relationship; as who was a Person's Grandfather, or whom he married, or how many Children he had, and whether legitimate or not; or to prove the Time of a Marriage, or the Birth of a Child, or the like (*c*): so Proof by one of the Family, that a particular Person had many Years before gone Abroad, and was supposed to have died there, and that the Witness had not heard in the Family of his having married, was admitted as Evidence of the Person's Death, without lawful Issue (*d*); but the Tradition must be from Persons having such a Connexion with the Party to whom it relates, that it is natural and likely, from their domestic Habits and Connexions, that they are speaking the Truth, and that they could not be deceived (*e*). The Declarations of a deceased Husband, as to the Legitimacy of his Wife, though not related by Blood, have been admitted (*f*). The written Memorandum of a deceased Father of the Time of his Son's Birth, has been admitted to prove his Son's Age (*g*). And the like of a deceased Surgeon to prove the Time of a Birth he attended (*h*). Upon the same

(*a*) 6 T. R. 330.

(*e*) 13 Ves. 514. Coop. Ch.

(*b*) Cowp. 572. 592. 8

Rep. 39.

East, 203. 11 East, 133.

(*f*) 13 Ves. 148.

Bull. N. P. 113.

(*g*) Sir Tho. Raym. 84.

(*c*) 1 Phill. Evid. 238.

7 East. 290.

(*d*) 15 East, 293. 4 Barn.

(*h*) 10 East. 120. Vin.

and Ald. 434. 1 Bl. Rep.

Abr. Tit. Ev. 91.

404. 6 East. 80.

Principle, Inscriptions upon Monuments, Descriptions and Recitals in Wills and Deeds, and in Bibles and Registry-Books, the Heralds' ancient Visitations, taken by Commission under Seal, old Pedigrees hung up in a Family Mansion, Engravings on Rings, have been admitted (*a*); in these Cases recourse must be had, from Necessity, to the best Evidence that the Nature of the Subject will admit; but the Opinion of deceased Neighbours, or of mere Acquaintances of the Family, on a Question of Pedigree, are not Evidence (*b*); nor is the Hearsay Evidence of a Relative to be admitted where the Relative himself can be produced (*c*). It may not be improper here to observe, that a Distinction is made between Evidence of *mere* Facts, and of *general Reputation* (*d*); in Cases of Pedigree the Declarations of deceased Members of a Family as to the *Time* of Birth, Marriage, or Death, of any Member, are admitted as Evidence of general Reputation; but the *Place* of Birth being a particular Fact, involving a Question of Locality, does not fall within the general Rule, and must be proved by Evidence (*e*). In Proof of a Pedigree, it has been recently decided, that Declarations, *in articulo mortis*, of a deceased Person, (not a Relation, or connected with the Parties,) as to the Relationship of the Lessor of the Plaintiff, and the Person last seised, cannot be received in Evidence (*f*). And it may be proper to remark that the Declarations of a deceased Member of a Family, on a Question of Pedigree, are not admissible if *ma ost litem motam*, or after a Controversy preparatory to one (*g*). A Pedigree drawn out by a deceased Relation, after doubts

(*a*) 13 Ves. 144. Bull. N. P. 233. Cowp. 594. 11 East, 505. (c) 2 Stra. 924. Bull. N. P. 113. 3 Campb. 457.

(*b*) 13 Ves. 147. 511. 3 T. R. 723. 1 Maule and Sel. 689. 14 East, 330. (d) Peake's Evid. 12. 16. (e) 8 East. 589. (f) 4 Barn. and Ald. 53. (g) 4 Campb. 401. 2 Sel. N. P. 731.

had arisen as to the Pedigree, and found amongst her Papers after her Death, has been rejected (*a*). In Questions concerning Public Rights, common Reputation is admitted to be Evidence: on a Question whether a Corporation has a prescriptive Right to collect Tolls on a Public Navigation, the Declarations of deceased Persons who have been heard to acknowledge the Right, and that they had been so informed by their Predecessors, have been received (*b*): the same Reason applies to Questions respecting general Customs relating to Parishes, or Manors, or the Inhabitants of Towns, and other Places, : so, as to the Boundary between Parishes, or Manors (*c*), or a customary Right (*d*), or Parochial or Manorial Customs (*e*); such Declarations have been received in Evidence; Perambulations are Evidence of the Extent of a particular Parish or Manor (*f*): but this Evidence is confined to what such old Persons have said, who were in a Situation to know what the Rights were, and who had no Interest to misrepresent; and a Foundation, by shewing an Exercise of the Right, ought to be laid, or Acts of Enjoyment within living Memory, to let in such Evidence; where the Subject Matter does not admit of such Acts of Enjoyment, the Opinion of the Place is admissible; as on a Question of Parochiality, Proof of Reputation is admissible: on a Question of Parochial Modus, and on a Parochial or Manorial Boundary, Evidence of Reputation is admissible on an individual Right, where a Class or District of Persons is concerned; though the Deceased was a Parishioner, and liable to pay Tithe (*g*), and claimed Right of Common: but not to prove a Farm Modus (*h*); but the Tradition of a *particular Fact*,

(*a*) Coop. Ch. Rep. 39.

(*e*) 2 Ves. 512. 12 East.

(*b*) 14 East. 329. 1 Maule

62. 1 Wight. 112.

and Sel. 679. 685.

(*f*) 1 Maule and Sel. 687.

(*c*) 1 Maule and Sel. 81.

(*g*) 1 Wight. 112.

(*d*) 1 T. R. 466. 5 T. R.

(*h*) 14 East. 331. 4 Madd.

26. 31. 3 Gwill. 351.

214.

done in the Exercise of that Right, will not be Evidence (*a*). Evidence that a *particular Person*, since deceased, paid a certain Sum in lieu of Tythes, would not be admissible, on a Question of Parochial Modus, but Declarations of old Inhabitants, that so much per Acre was paid in lieu of Tythes, would be received, as coming within the general Rule of Evidence of Reputation (*b*). The Admissibility of common Reputation, as Evidence of prescriptive Rights, strictly private, except as to a Right of Way, has been the Subject of considerable Doubt (*c*). Old Leases and Counterparts, and old Rent Rolls, have, in certain Cases, been received in Evidence, in favour of a Party claiming under the Lessors (*d*): for instance, to shew that the Lord of the Manor had granted the Land free from Common, though Possession was not shewn, the Leases being so old that no Person could speak to the Possession under them (*e*). The Declarations or Statements of deceased Persons have been admitted, where they appear to be made against their Interest; Entries in their Books, charging themselves with the Receipt of Money on account of a third Person (*f*), or acknowledging the Payment of Money due to themselves (*g*). A Declaration by the Owner or Occupier of adjoining Land, that his Neighbour's Land extends to such a Spot, accompanying an Act of Forbearance to go beyond the Spot for that Reason, (or without such Act, if he speaks against his Interest,) is Evidence that the Land extends so far (*h*). Or a Declaration of a deceased Occupier that he rented it under a certain Person, is Evidence of

(*a*) 3 T. R. 709. 5 T. R. 123. 14 East, 330. 1 Price, 253. 1 Anstr. 298. (*d*) 3 Bro. P. C. 553. Vin. Abr. Tit. Evid.

(*e*) 5 T. R. 412.

(*b*) 4 Price, 20.

(*f*) 4 T. R. 515. 4 T. R.

(*c*) 14 East, 327. Bull. 669.

N. P. 295. 3 Campb. 288. (*g*) 2 Stra. 1129. 10 East, 118. 15 East, 33.

(*h*) 14 Ves. 332 341.

that Person's seisin (*a*); but a Memorandum or Entry, before it can be received in Evidence, must be proved to be authentic, by shewing it to be the Hand-writing of the deceased Person who knew the Fact there stated, or that it was signed by him (*b*), or if signed by another, that it was by his Order, or acknowledged by him. Entries made by a deceased Rector or Vicar, as to the Receipt of Ecclesiastical Dues, have been in several Cases admitted as Evidence for his Successor, because he had no Interest to mis-state the Fact in making an Entry, which could not possibly be Evidence for himself: to prove these Entries, the Vicar's Book has been produced from the Parish Chest, one of the three legitimate Depositories for such Books, viz. the Bishop's Registry, the Registry of the Archdeacon of the Diocese, and the Parish Chest (*c*). And similar Entries made by deceased impropriate Rectors, have been received in Evidence for their Successors, although objected to as coming from the Owners of the Inheritance (*d*). An Entry in a Parish Register by a deceased Vicar, of different Moduses, has been admitted (*e*). What a Party has himself been heard to say, does not fall within the Objection to Hearsay Evidence; any thing, therefore, which he *admits*, whether suing in his own Right, or merely as Trustee for another, or which another asserts in his Presence, and he does not contradict, is received as Evidence against him (*f*); but the whole Account must be taken together (*g*), as if he admit the Receipt of Money, and say, at the same Time, that he paid it away, this is no Proof of a Debt, but it must be *uno flatu*. The Evidence of the Wife of the

(*a*) 4 Taunt. 16. 1 Campb.
367.

(*b*) 4 T. R. 515. 3 Gwill.
847. 861.

(*c*) 2 Gwill. 529. 4 Price,
218. 264. 5 Price, 369. Dan.
104.

(*d*) Bunb. 46. 180. 4 Gwill.
1618. 2 Gwill. 653.

(*e*) Wight. 63. 2 Price,
307. 329. 399. 4 Dow. 320.

(*f*) 7 T. R. 663.

(*g*) 5 Taunt. 245.

Party, or any other Person in his Absence, is not admissible, unless employed or entrusted in the Subject Matter ; nor the *Acknowledgment* of a Fact, nor Conversations of the Attorney in the Cause, unless *expressly* to obviate the Necessity of proving a Fact (*a*). A Promise made by a Wife during coverture, will not revive a Debt due before Marriage, to take it out of the Statute of Limitations (*b*). Where a Contract has been made by the Wife, and afterwards expressly or tacitly ratified by the Husband, her Declarations have been received as Evidence to charge him (*c*) ; but it has been doubted whether these were rightly received, than as part of the *res gesta* ; it seems to be decided that the Admissions of a *mere Servant* are only receivable to that extent (*d*) : a Distinction has been made between an *Admission*, and an *Offer of Compromise* after a Dispute ; the latter has not been admitted as Evidence of a Debt (*e*). Acts done by a Person, will preclude him, in the Way of *estoppel*, from disputing the Situation, which he holds out to the Public : in an Action for Non-Residence, the Receipt of Tithes by a Parson, is sufficient Evidence against him, of his being such without formal Proof of his Title (*f*).

Many of the foregoing Cases, falling under the Head of *Presumptive Evidence*, it may not be improper to subjoin some few Observations on that species of Evidence. The Civilians define *Presumptio nihil aliud est, quam Argumentum verisimile, Communi sensu Perceptum ex eo, quod Plerumque fit aut fieri Intelligitur*. Presumptions are of *Law*, as well as of *Fact* : that Children born during a lawful Marriage, shall be presumed to be Legitimate, is a Presumption of Law which may be rebutted by Circumstances

(*a*) 1 Campb. 70. 141. 375.

(*e*) Bull N. P. 236. Peake.

(*b*) 1 Taunt. 213.

Evid. 23.

(*c*) 1 Stra. 527. 1 Esp.

(*f*) 3 T. R. 635. n. 1 N.

N. P. 142.

Rep. 210. Wight. 67. 5 T.

(*d*) 7 T. R. 668. 4 Taunt.

R. 4. 1 Phill. 152.

511. 565. 663.

inducing a contrary Presumption (*a*); and the Fact of Non-access may be lawfully proved. So a Child born after a Divorce *a mensâ et thoro*, is presumed to be Illegitimate, but Access may be proved (*b*). And a Receipt for Rent, due on a certain Day, is strong Presumptive Evidence that the former Rent has been regularly paid to that Period, more especially if it be in Full of all Demands; but being only Presumptive Evidence, the contrary may be proved (*c*). That Grants and Deeds are to be presumed, in support of long undisturbed Possession, is also a Presumption of Law. Possession is *prima facie* Evidence, which, with an Assertion of Property, or alone, gives the Possessor such a Property as will enable him to maintain an Action against a Wrongdoer (*d*), Proof of which, without Documentary Evidence, will be sufficient, unless some contrary Proof should render ulterior Proof necessary. In Cases not within the Statute of Limitations, the most solemn Instruments have been presumed to support long and uninterrupted Possession (*e*). Charters and Grants of the Crown have been presumed before the *nullum tempus* Bill, 9 Geo. III. c. 16, though no Statute of Limitation bars the Crown (*f*); but where Length of Possession is a Ground for presuming a Release, it must be an adverse Possession (*g*). An Endowment of a Vicarage has been presumed from long and continued Possession of Tithes and other Profits (*h*); and long and continued Usage will support a *modus decimandi*; an Agreement by all necessary Parties, beyond Memory, will be presumed, but not to support a *modus de non decimando*,

(*a*) 8 East. 193. 206. 4 T. R. 356. 2 Selw. N. P. 681.

(*b*) 1 Salk. 123.

(*c*) Gilb. Evid. 142. 1 Camp. 392. 532. 4 Taunt. 246.

(*d*) 1 Stra. 505. 1 East. 244. 2 Taunt. 302.

(*e*) 12 Rep. 5. 3 T. R. 151. 158. 11 East, 488.

(*f*) Cowp. 110.

(*g*) 1 Meri. 114.

(*h*) 12 Rep. 4. 2 Gwill. 514. 716. 732.

by a Layman, against a Spiritual Rector; and in a *Composition Real*, in lieu of Tithes, temporary Agreements being frequently made with the succeeding Incumbents, if a Deed cannot be produced, Evidence referring to the Deed, or shewing its Existence, or the Exercise of some adverse Right, independent of mere Usage, must be given (*a*). Uninterrupted Enjoyment of an Easement for twenty Years and upwards, is such strong Evidence of a Right of Enjoyment, as to presume a Conveyance; but the Possession from which the Grant would be presumed, must be with the Knowledge of the Reversioner or Remainder-Man, who, after the Death of a Tenant for Life, or for Years, may dispute the Easement, unless he can be shewn to have acquiesced (*b*). A Faculty from the Ordinary may be presumed from the long uninterrupted Usage of a Pew in a Church, claimed as Appurtenant to a Messuage (*c*). So, after the adverse Enjoyment of a Right of Way over another's Land for twenty Years, a Grant will be presumed, although the Way was extinguished by an Inclosure Act (*d*): but an adverse Possession for a shorter Period than twenty Years, will not of itself, without other Evidence, afford a Ground for such Presumption (*e*). A Licence to inclose may be presumed within that Period, though not a Grant (*f*); but this being only presumptive Proof, may be repelled by Evidence; for Length of Time is not an *absolute Bar*, like the Statute of Limitations, it is only a presumptive Bar, to be submitted to a Jury (*g*). The Usage, founded on a Grant or Agreement, determines the Extent of it (*h*), and

(*a*) 2 Bos. and Pull. 206. (*d*) 3 Gwill. 1262. 11 East.
1 Wightw. 324. 1 Price, 253. 375. 1 Camp. 260. 4 Camp.
3 Price, 308. Eden. 296. 16.

Phill. Evid. 158.

(*e*) 4 Bun. 1963. 6 East.

(*b*) 2 Saund. 175. a. b. 3 215.

T. R. 159.

(*f*) 11 East. 56.

(*c*) 1 T. R. 431. 5 T. R.
296.

(*g*) 1 Phill. Evid. 160.

(*h*) 14 East. 339.

is considered to be commensurate with the Right enjoyed. Where a Person having a Way for Carriages, from *D* to *B*, over another's Land, purchases Land adjoining *B*, he cannot use the Way with Carriages to the adjoining Land, though he comes first to *B*, and so to the adjoining Land, it may be prejudicial to the other's Close (*a*): the Use of a Carriage-Way is Evidence of a Right for all kind of Cattle (*b*). A Bond may be presumed to have been satisfied after a Forbearance for twenty Years, unexplained on the Part of the Obligee (*c*); but a Quit-Rent claimed by the Lord of the Manor, cannot be presumed to be released or extinguished within less than fifty Years, the Period fixed by the Statute of Limitations (*d*).

Written Evidence has been divided into two Classes, *Public* and *Private*; of the former, some Writings *are of Record*, and others *not of Record*: the latter have been distinguished into such as are of a *judicial* Character, and others of a *private* Nature, but not *judicial*. *Records* are the Memorials of the Proceedings of the Legislature, and of the Courts of Justice; they are of such Authority, that no Evidence is allowed to contradict them (*e*). Of these are the *Public Acts* of Parliament, of which Printed Copies, and the Printed Statute Books, are received in Evidence in all Courts of Law and Equity, without being formally set forth (*f*). A *Private Act* of Parliament must be proved by an examined Copy, compared with the Parliament Roll at Westminster (*g*), unless declared, by a Special Clause, to be a Public Act. *Exemplifications* of Copies under the Great Seal, become themselves Records, and are admitted

(*a*) Roll's Abr. Tit. Chemin.
3. l. Lutw. 111.

(*b*) 1 Taunt. 279.

(*c*) 4 Bun. 1963. 1 T. R.
270. 1 Bun. 434. Cowp.
109.

(*d*) 32 Hen. 8. c. 2. s. 4.
Cowp. 214.

(*e*) Co. Litt. 117. 12 Rep.
24. 25. Gilb. Evid. 5.

(*f*) Gilb. Evid. 8. 49 Geo.
3. c. 90. s. 9.

(*g*) Bull. N. P. 222.

in Evidence without any extrinsic Proof of their genuineness (*a*); but before Exemplifications, or other Copies of Records are made, the whole Record should be drawn up in Form, ingrossed on Parchment, and brought into Court, and there filed as a Roll of the Court; and as nothing but Records can be proved by Exemplification, *Private Deeds* exemplified will not be received in Evidence; being in the Custody of the Party, they ought to be produced to shew any Erasures or Interlineations (*b*). Exemplifications of the Records of the superior Courts, under their respective Seals, are also received in Evidence, without further Proof (*c*): so, Letters of Administration, under the Seal of the Prerogative Court of Canterbury, prove themselves in a Cause relating to Personal Estate (*d*); and in like manner Letters Patent: but the Seals of Private Courts, or of a Foreign Colonial Court (*e*), or of a Corporate Body (*f*), ought to be proved, by a Person acquainted with their Impression, that it is the Seal of the Corporate Body, but not by seeing the Seal affixed: the Seal of the Corporation of London has been held to prove itself (*g*). Copies of Records, not under Seal, are *Sworn Copies*; and *Office Copies* of these Sworn Copies, will be sufficient Evidence in a Court of Law. Copies of Records, like other Transcripts, are proved by a Witness who has examined the Copy, Line for Line with the Original, or examined the Copy, whilst another read the Original (*h*); and it should appear that the Original came out of the proper Depository, or out of the Hands of the proper Officer (*i*). When an ancient Record has been lost, a Copy has been admitted, without proving it a true Copy (*k*); but it should be *vetustate temporis, aut*

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| (<i>a</i>) Gilb. Evid. 14. 19. | (<i>f</i>) 8 T. R. 307. |
| Hard. 118. 1 Phill. Evid. 385. | (<i>g</i>) 1 Esp. N. P. 53. |
| (<i>b</i>) Peake, Evid. 36. | (<i>h</i>) 1 Campb. 470. 2 Taunt. |
| (<i>c</i>) Dyer, 276. Sayer, 297. | 52. 1 Esp. N. P. 263. |
| 1 Phill. Evid. 387. | (<i>i</i>) 4 Campb. 372. 1 Star- |
| (<i>d</i>) Ca. Temp. Hardw. 108. | kie, 183. |
| (<i>e</i>) 3 East. 221. | (<i>k</i>) Ventr. 257. |

judiciariâ cognitione roboratum (a); for if a recent Roll be lost, and its Contents can be ascertained, the Court will permit a fresh one to be ingrossed (b). A Copy, authenticated by a Person appointed for that Purpose, is of itself Evidence without further Proof (c), as the Chirograph of a Fine (d). So, an Indorsement by the proper Officer on a Deed of Bargain and Sale, inrolled pursuant to 27 Hen. 8. c. 16, which thereby becomes a Record, is Evidence of the Inrolment (e): and an Indorsement of the Date of the Inrolment, by the Clerk of the Inrolments, is a material Part of the Fact of the Record, and Proof of an Averment of a different Date, is not admissible (f): and so, as to the Date of the Inrolment of the Memorial of an Annuity Deed (g); but where the Officer is only *intrusted* with the Custody of the Records, his Certificate confers no Authority, and the Copies must be proved in the regular Course: the Office-Copies of the Bill, Answer, and Proceedings in Chancery are allowed to be read in that Court without further Proof; but in Courts of Law they are not received in Evidence, unless examined with the Records and proved (h). And in like Manner, the Indorsement by the Chirographer of the Proclamations on the Fine, is not Evidence; to prove these they must be examined with the Rolls of the Court, and proved as in other Cases (i). The Copy of a Judgment in a Court of Law, made by the proper Officer, must be examined with the Record.

A Bill in Chancery is not Evidence at Law against the Party, even of the Facts on which the Plaintiff grounds his Claim for Relief (k); but if a Bill states a Defendant to be

(a) Gilb. Evid. 19.

(b) 2 Burr. 722.

(c) 1 Phill. Evid. 388.

(d) Gilb. Evid. 19. 2 Star-

kie N. P. 13.

(e) 1 Dougl. 56.

(f) 3 Price, 495. 511.

(g) 3 Taunt. 540.

(h) Bull. N. P. 229. 2 Star-
kie, N. P. 13.

(i) Gilb. Evid. 21. 3 Taunt.
166.

(k) 2 Esp. N. P. 499. 7
T. R. 12. Selw. N. P. 713.
Dom. Proc. Banbury Peer.

out of the Jurisdiction, though it is admitted by the Defendants, some of whom are Infants, Proof of that Fact at the Hearing is necessary, and it has lately been so determined, where all the Defendants are Adult (*a*). If the Defendant refuses to produce the Office-Copy of the Bill, the Plaintiff's draft Copy cannot in strictness be read; the Record must be inspected: so, where the Original Bill is not on the File, the Office-Copy of the Bill cannot be read in Evidence, though an Officer of the Court is ready to prove that the Original Bill cannot be found amongst the Records (*b*). *An Answer* being a Confession on Oath, and therefore strong Evidence against the Party, all the Parts must be taken together, connected and entire; if Part is read, the whole must be read (*c*), and also a further Answer, if any has been put in; but what is stated, by way of Hearsay only, is not admitted as Evidence (*d*): the Answer of an Executor to a Creditor's Bill, stating that he believes a Debt is due, is not, it seems, a sufficient Foundation for a Decree, without further Evidence (*e*): an Answer not replied to is taken as true in all its Parts (*f*). The Answer of one Defendant, though Evidence against himself, cannot be read against a Co-Defendant (*g*); but the Admission of one of two Co-Partners, of joint Contracts during their Partnership, has been received to charge the other (*h*). The Answer of an Infant, by Guardian, is not Evidence; he is not bound by Admissions (*i*); but an Answer by the Mother and Guar-

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| (<i>a</i>) 4 Madd. 408. Flath.
Dig. 204. | (<i>f</i>) 3 Bro. C. C. 340. |
| (<i>b</i>) 11 Ves. 583. 2 Madd.
Chanc. 442. 7 Bro. C. C.
306. 317. | (<i>g</i>) 3 P. Wms. 311. 2 Ves.
90. 2 Ves. j. 11. 12 Ves.
361. 355. 2 Madd. Chanc.
441. 2 Starkie, 366. 2
Swanst. 392. |
| (<i>c</i>) 13 Ves. 53. 2 Ball.
and Bea. 386. 15 Ves. 362. | (<i>h</i>) 1 Taunt. 104. 1 Star-
kie, 161. |
| (<i>d</i>) 2 Bos. and Pull. 542.
2 Dougl. 788. | (<i>i</i>) 3 P. Wms. 237. |
| (<i>e</i>) 6 Ves. 738. | |

dian may be read against the Mother in another Suit, in which she is Defendant in her own Right (*a*). Whether the Answer of a Feme Covert can be used against her after her Husband's Death, has not been decided (*b*). The Answer of a Defendant, not brought to a Hearing, has been read as Evidence against another Defendant at the Hearing (*c*). If an Answer has been read, and it is insisted that there is a Mistake in the Office-Copy, the Original Answer will be sent for, from off the File (*d*). An Answer cannot be regularly given in Evidence at Law without Proof of the Bill; but where it has been proved that the Bill had been searched for in the Office, and cannot be found, the Answer has been allowed to be read (*e*). An examined Copy of an Answer, compared with the Record upon the proper Stamp, will be received as Evidence at Law, without shewing that there has been any Decree in the Suit (*f*). An Order to read in one Cause, the Bill, Answer, and other Proceedings in another Cause, is regular, and will be admitted in Evidence between the same Parties, but cannot be extended to a third Person, not Party to the Suit (*g*). If a Defendant disclaims, his Evidence cannot be read as a Proof of Plaintiff's Right, to the Prejudice of another Defendant (*h*); nor, if he may by possibility, be liable to Costs; his Evidence is not admissible in favour of a Co-Defendant (*i*), especially if he is also a Trustee (*k*). An Answer, though not used as Evidence in a Cause, may be read as to Costs (*l*).

Depositions taken in a former Cause, cannot be read as Evidence in another Cause against a Stranger, who was not

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| (<i>a</i>) 1 Atk. 203. | (<i>f</i>) 16 East. 324. 2 Campb. |
| (<i>b</i>) 3 P. Wms. 237. 3 Ves. 87. | 3 Campb. 401. |
| and Bea. 166. | (<i>g</i>) 1 Atk. 203. |
| (<i>c</i>) Dick. 24. | (<i>h</i>) 2 Atk. 39. |
| (<i>d</i>) 2 P. Wms. 425. | (<i>i</i>) 1 Atk. 204. 3 Atk. 401. |
| (<i>e</i>) Gilb. Evid. 49. | (<i>k</i>) 2 Bro. C. C. 330. |
| | (<i>l</i>) 1 Madd. Rep. 13. |

a Party, nor claims under the Party against whom the Depositions were taken (*a*), nor can they be used by a Stranger against one of the Parties (*b*), unless in Cases of Hearsay Evidence and Reputation, as in Questions of Custom, or Right to Tolls, &c., and then not if made *post litem motam* (*c*); but in a Suit by a Legatee against an Executor, upon Proof of Assets, another Legatee, not Party, may have the Benefit of those Depositions (*d*). Where the Question is the same, and the Defence the same, in two Causes between the same Parties, Depositions taken in one Cause, may be read in the other (*e*). Evidence in a Cross-Cause, concerning the Matters in issue in the Original Cause, is not allowed to be read after a Decree in that Cause: otherwise as to the Depositions in the Cross-Cause, not relating to the Matters in issue in the Original Cause (*f*): where neither Party examines Witnesses in the Original Cause, the Depositions of Witnesses examined to the same Matter put in issue by that Cause, may be read at the Hearing of the Cross-Cause (*g*). Depositions to a Fact, not put in issue by the Bill, will not be allowed to be read in Evidence (*h*); but the Depositions of a Witness, disinterested at the Time of making them, have been ordered to be read for him in Chancery, as Evidence in his own Suit, on a Bill of Revivor, though refused in a Court of Law (*i*). Where one Defendant is charged with a Fraud, his Deposition cannot be read for another Defendant, as it may tend to excuse him with regard to his own Costs (*k*). Depositions of one Defendant may be read for another Defendant

(*a*) 1 Atk. 204. 1 Vern.
413. 1 Ventr. 347.

(*b*) 2 Price. 434. Hardr.
472.

(*c*) Bull. N. P. 239. Carth.
181.

(*d*) 1 Vern. 413.

(*e*) 2 Vern. 447.

(*f*) 3 Atk. 501.

(*g*) 1 Atk. 501.

(*h*) 11 Ves. 240.

(*i*) 2 Vern. 699. 1 P.
Wms. 287. 2 Atk. 615. 2
Ves. 42. 1 Stra. 101. 1 Salk.
286.

(*k*) 1 Atk. 204.

where the Court thinks there is no material Evidence against the first Defendant, or that no Decree can be made against him (*a*); and they may be also read for the Plaintiff; but if the Defendant, who is offered in Evidence for another Defendant, may, by any possibility, be liable to Costs, this is always a Reason for refusing his Evidence, because he is interested so far as to be swearing to excuse himself (*b*). The Deposition of a Defendant, against whom the Plaintiff can give no Evidence, may be read for another Defendant (*c*). If a Cause is brought on to a Hearing, and stands over, with Liberty to add a Party, if he is a material Defendant, and concerned in Interest, the Depositions taken previously cannot be read against him (*d*). The Deposition of a Prochein Ami, nor of the Wife of a Prochein Ami, cannot be read for the Plaintiff, being liable to Costs (*e*). A Deposition cannot be read as to Costs where it has not been read as Evidence in a Cause (*f*). It seems decided, that at the Hearing it is too late to object to Depositions taken *de bene esse*; there should have been a Motion to discharge the Order for Publication (*g*). Depositions in Chancery, may be given in Evidence at Law, on the same Matter, and between the same Parties, or those claiming under them, if the Witness is dead (*h*), or not to be found (*i*), or unable, from Sickness, to attend (*k*), or kept out of the way by Contrivance (*l*), or out of the Kingdom, and not amenable to Process (*m*). On an Issue, or an Action, directed by the Court of Chancery, an Order is

(*a*) 2 Ves. 224.

(*b*) 3 Atk. 402.

(*c*) 3 P. Wms. 288.

(*d*) Bunb. 310.

(*e*) 3 Atk. 511. 517.

(*f*) 1 Madd. 13.

(*g*) 2 Atk. 190.

(*h*) 1 Atk. 445. 2 P. Wms.

(*i*) 2 Stra. 920.

(*k*) Bull. N. P. 239. 1 Cox,
184. 1 Ves. and Bea. 22.
340.

(*l*) Bull. N. P. 243.

(*m*) 1 Atk. 445. 1 Eq. Ca.
Abr. 16. 18.

usually made to read the Depositions on the Trial: if it is shewn that the Witness cannot attend in Person (*a*), without such Order, the whole Record of Bill, Answer, &c., must be read (*b*); but they have been allowed without such antecedent Proof, where they were so ancient that no Bill could be found (*c*). *Depositions taken de bene esse*, before Answer, or before Defendant is in Contempt, are objectionable, but admissible at Law, if the Defendant has had an Opportunity of cross-examining (*d*). Depositions taken in an Ecclesiastical Court, in a Cause within its Jurisdiction, not relating to Lands, are admitted in Evidence (*e*); the Doubt has been whether Depositions taken in a Court, *not of Record*, can be read *elsewhere* (*f*). So, Depositions in Chancery are proved at Law by a sworn Copy on proper Stamps, examined with the Original (*g*), though not a Court of Record.

A Decree in Chancery may be proved at Law, by an Exemplification under the Seal of the Court, or by a sworn Copy; or by a Decretal Order in Paper, with Proof of the Bill and Answer (*h*): it has been held that the Bill and Answer need not be proved, if they are recited in the Decretal Order (*i*); but it should seem, that if so much only is recited as is deemed necessary to introduce the Decretal Part, the Bill and Answer must be proved (*k*). A distinguished Author states the Rule, as generally laid down, that where a Party intends to avail himself of a Decree, and not to prove an extrinsic collateral Fact (as that a Decree was made by the Court) (*l*), he ought regularly to give in

(*a*) 1 Ves. and Bea. 340.

(*f*) Bull. N. P. 242.

(*b*) 15 Ves. 176. 5 Burr.

(*g*) 2 Starkie, 13. Bull.

2594. 4 Maule. and Sel. 229. 4 Inst. 84.

497.

(*h*) 1 Keb. 21. Com. Dig.

(*c*) 2 Price, 234. Esp. Ev. C. 1. pa. 94.

N. P. 85.

(*i*) Ibid. 1 Phill. Ev. 393.

(*d*) 1 Maule and Sel. 4.

(*k*) Dougl. 579.

(*e*) Gilb. Evid. 60. 1 Phil.

(*l*) Coop. 17.

Evid. 30.

Evidence the Proceedings on which the Decree is founded (*a*). And it is said in a Book of Authority (*b*), that while the Decree remains in Paper, it cannot be read in Evidence for the Purpose of proving its Contents, without laying a Foundation by Proof of all the former Stages of it, as the Bill to make way for the Answer, and so on.

A Probate of a Will, under Seal unrevoked, is of itself, without further Proof, conclusive Evidence in Civil Cases of the Validity of a Will of personal Estate, and the only Legitimate Evidence of personal Property being vested in an Executor, or of his Appointment; the Original Will is not admissible for that Purpose, until it is proved in the Ecclesiastical Court (*c*); nor can it be read in Evidence, though the Original Will and Probate be produced by the proper Officer, unless it bears the Seal of the Court, or some other Mark of Authentication (*d*); and as it is not impeachable in a Court of Law, Payment to an Executor, who has obtained Probate of a forged Will, is a good Discharge to the Debtor, though the Will be afterwards proved null and void (*e*). The Probate of a Will devising real Estate, is not Evidence of the Contents of the Will as to such Property, even if the Original Will be proved to be lost, or to prove a Relationship (*f*). If the Probate be lost, an Exemplification from the Record of the Spiritual Court will be Evidence of the Proof of the Will (*g*); and an examined *Copy of the Probate* is Evidence of the Person there named being Executor (*h*); but a *Copy of the Will* would not be Evidence (*i*). To prove the Revocation of a Probate, an examined Copy

(*a*) Bull. N. P. 235. Com. Dig. Ev., pa. 85. Gilb. Ev. 56. 65. T. Jones, 164. 1 Phill. Evid. 392.

(*b*) Peake Evid. 64. 67.

(*c*) 2 Selw. N. P. 730. 2 Dougl. 707.

(*d*) Starkie. N. P. 243.

(*e*) 3 T. R. 125.

(*f*) Bull. N. P. 246.

(*g*) 1 Stra. 412. 2 Selw. N. P. 730.

(*h*) 1 Lord Raym. 154. Skin. 584.

(*i*) Bull. N. P. 246.

of the Entry in the Revocation Book of the Prerogative Court has been admitted in Evidence (*a*). If there is a Variance between the Original Will and the Probate, a Cause in Chancery has been directed to stand over, with Liberty to apply to the Spiritual Court to make the proper Amendment in the Probate (*b*): so, where the Probate has been obtained by Fraud; the Cause has stood over till tried in the proper Court, or that Court may compel a Revocation (*c*). *Letters of Administration* under Seal, are Evidence of themselves, without Proof: and the Original Book of Acts, directing Administration to be granted, with the Surrogate's fiat, is also Evidence (*d*): an examined Copy, therefore, of the Act-Book is Evidence that Administration was granted to the Party, without Notice to produce the Administration (*e*); and as an Exemplification of Letters of Administration is never granted, a *Certificate* of that Fact will be admitted in Evidence (*f*).

Public Writings, not Judicial, are Journals of Parliament: an examined Copy, compared with the Original Minutes in the Journals of the House of Lords, that a Judgment has been reversed is Evidence of the Fact of Reversal (*g*); the Printed Journals are not Evidence (*h*). So are *Gazettes* Evidence of Notices in Bankruptcy, &c., and of a Public Notification of Dissolution of Partnership; but to affect Persons entitled to Notice with the latter, Proof must be given of their being in the Habit of reading the Gazette (*i*): And to make ordinary Newspapers Evidence, Proof of the Party taking in the particular Paper (*k*). And the *Register* kept in Churches is Evidence of *Births, Marriages, and Burials*;

(*a*) Leach. Cr. Ca. 30. n.

(*b*) 2 Atk. 50.

(*c*) 1 Ves. 119. 1 Atk. 630.

(*d*) 3 East. 187. 2 Maule and Sel. 567.

(*e*) 13 East. 232. 230.

(*f*) Bull. N. P. 246.

(*g*) Cowp. 17. Phil. Evid.

397. Peake. Ev. 34.

(*h*) State Trials, 29th vol., 683.

(*i*) 1 Starkie N. P. 186. Peake N. P. 42. 155. 2

Camp. 619. 1 Chitt. 121.

(*k*) 1 Starkie N. P. 186.

a Sworn Copy of an Entry in the Parish Register, is admitted in Evidence; but such Entry is not essential to the Validity of a Marriage; if any Error in the Entry should prevent its Admission in Evidence, Proof of the Similarity of the Parties' Hand-writing in the Original Register, or Proof by Reputation, or by Persons present, or other Circumstances, is admissible (*a*). The Copy of the Register of a foreign Chapel is not admissible to prove a Marriage abroad (*b*); nor is the Copy of an Entry in the Register-Book of Baptisms in the Island of Guernsey admitted here (*c*). Proof of the Entry of the Birth of a Dissenter's Child, in a Register kept for that Purpose at a Public Library, has been rejected (*d*). The Parish Register is admissible, though a Leaf be lost, if it does not destroy the Series of Entries (*e*). The Forgery of a Register, though it may considerably affect, will not destroy the Effect of other Evidence (*f*). The Books of Fleet Marriages cannot be received as Evidence of a Marriage, not having been compiled under Public Authority, nor even as a Private Memorandum; but they have been received as a Declaration of the Fact,* and to shew the Name by which a Woman passed when she was married there (*g*).

The Bank Books are received in Evidence to prove a Transfer, and also Stock standing in the Bank of England;

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| (<i>a</i>) Bull. N. P. 27. 4 Burr. 2057. Dougl. 162. 174. | (<i>f</i>) 16 Ves. 59. Coop. 155. |
| (<i>b</i>) 1 Esp. N. P. 333. | (<i>g</i>) Peake. N. P. 231. |
| (<i>c</i>) 1 Cox. 275. | Coop. Rep. 155. 16 Ves. 59. |
| (<i>d</i>) 1 Ja. and Wa. 483. | Esp. N. P. 213. Peake. 136. |
| (<i>e</i>) 18 Ves. 443. 1 Phil. 315. | Manning. Dig. 124. |

* The Books of Registry of Marriages and Baptisms at the Fleet Prison, and the Rules thereof, from 1686 to 1754, with those at the Mint, and May-Fair Chapel, were ordered by the Secretary of State, Lord Sidmouth, to be deposited with the Registrar of the Diocese of London, in Doctors' Commons. *June 7th, 1821.*

examined Copies of the Entries are *direct Evidence*; but upon a Question, whether the Signature to a Transfer is the genuine Hand-writing, the Books themselves must be produced (a): the Evidence of the Broker who effected the Transfer is not sufficient (b). *A Vestry Book*, containing old Entries of Repairs done to a Pew by the Owner of a Messuage in the Parish, has been admitted as Evidence of his Right (c). And Entries in *Corporation Books* are admissible in Suits between the Members, but not as against Strangers (d). And the like Copies of Entries in the Books of the *East India Company* (e), or of the *Commissioners of Excise* (f). An Author of distinguished Merit has laid it down as settled, that Proof of Entries in *Public Books*, by examined Copies, is received as Evidence wherever the Original is of a *Public Nature*, and admissible; but when the Original is of a *Private Nature*, a Copy will not be Evidence, unless the Original is lost or destroyed, or in the Possession of the opposite Party (g). *The Rolls of a Court-Baron*, or of a *customary Court*, have been admitted between the Lord and the Copyholders or Tenants; and so, ancient Writings found amongst the Rolls (h). *Surveys of the Religious Houses*, before the Dissolution of Monasteries, are admissible to shew what Tithes belonged to the Rector, and what to the Vicar (i). *Ancient Terriers or Surveys*, are Evidence of Manorial Tenures, or Boundaries; an *Ecclesiastical Terrier* is Evidence of the Possessions of the Church, and admitted in Questions of Tithe (k); but not

(a) 18 Ves. 198. 2 Esp. N. P. 665.

(b) Peack. Evid. 30. Manning's Dig. 126.

(c) 3 Campb. 288.

(d) 1 H. Black. 214. Cowp. 102. 1 Stra. 92. 1 Phill. Evid. 422.

(e) 2 Dougl. 593. n.

(f) Carth. 346. 2 T. R. 234.

(g) 1 Phill. Evid. 421.

(h) 1 T. R. 466. 473. 4 T. R. 670. 5 T. R. 26. 1 Maule and Sel. 92.

(i) 1 Wils. 170. 2 Gwill. 542. 3 Gwill. 856. 1240. 4 Dow. 325.

(k) 5 Price. 380.

unless it comes from some of the Legitimate Depositaries: the Bishop's Registry (*a*), the Registry of the Arch-Deacon of the Diocese (*b*), or the Church Chest (*c*); the Charter Chest of a College has been rejected (*d*); but a Terrier annexed to an old Prebendal Lease, from the Registry of a Dean and Chapter, has been admitted (*e*). Terriers alone are not sufficient to prove a Modus, without Evidence of Payment (*f*); and an *Endowment* without the Seal of the Bishop, and an *Inspecimus* of the former under Seal, coming out of *Private Lands*, and unconnected with the Subject-Matter, has been refused (*g*). A Terrier is strong Evidence against the Parson, unless signed by the Churchwardens, or Inhabitants (*h*); but though generally signed by the Parson, it is not essentially necessary to be so, the Want of the Signature is in favour of his Successor (*i*). On a *Farm-modus*, old Terriers, signed by the Rector, Churchwardens, and Inhabitants, though not by the Occupier of the disputed Farm, are Evidence against the Land-owners (*k*). The Copy of a lost Terrier has been refused (*l*). A *Licence from the Pope* has been received as Evidence of an Impropriation (*m*); and a *Pope's Bull*, to shew a special Exemption of Monastery Lands from Tithes (*n*). The ancient Books of the *Heralds' Office*, and the Visitations, taken by Commission under the Great Seal, from the 21 Hen. 8. to the 2 Ja. 2., are admissible to prove a Pedigree (*o*); but a Pedigree drawn out by a Herald at Arms, not supported

(*a*) 4 Gwill. 1406. 1593.
2 Anstr. 386.

(*b*) 4 Gwill. 1450. 3
Anstr. 789.

(*c*) 1 Dougl. 173. 5 Price.
369. 377. 3 Taunt. 91.

(*d*) 4 Gwill. 1406. 1453.

(*e*) 4 Gwill. 1406.

(*f*) 1 Ja. and Wa. 20.

(*g*) 4 Gwill. 1450.

(*h*) Bull. N. P. 248. 4 Esp.
N. P. 3.

(*i*) 4 Gwill. 1615. 3 An. 796.

(*k*) 3 Price. 19.

(*l*) 4 Price. 355.

(*m*) Palm. 427. Peake Ev. 87.

(*n*) Palm. 37. 1 Phill.
Evid. 422. 10 An. c. 18. s. 3.

(*o*) 2 Jon. 224. 1 Stra. 161.
Comb. 163. 1 Phill. Ev. 421.

by Proof from the *Legitimate* Visitations by Commission, has been rejected (*a*): and so the Recital in an Act of Parliament, of a Person being Heir at Law (*b*). The modern Entries in the Heralds' Office of Pedigrees have been rejected, as taken without Legal Authority: the Pedigree of a Person, in the Hand-writing of a deceased Relation, who had an Interest in it, as drawn out, though found after her Death amongst her Papers, has been refused as Evidence (*c*).

A *Deed* cannot be given in Evidence, without Proof of its Execution: if attested, whether under Seal or not, it must be proved by a subscribing Witness, who alone is competent, if living and in a Situation to be examined to prove his own Signature, and that of the Party (*d*). Attested Notices to quit (*e*), attested Warrants to distrain (*f*), and all attested Instruments, are within the Rule, which is so inflexible, that at Law a Confession or Acknowledgment by the Obligor himself, in a Bond; or even an Admission in an Answer to a Bill of Discovery, though sufficient in a Court of Equity (*g*), will not dispense with the Testimony of the subscribing Witness. And the Rule extends to all Cases, whether the Acknowledgment is offered in Evidence against the Party himself who made it (*h*), or against a third Person (*i*). And so, if the Deed be an existing Instrument, or cancelled (*k*), or lost (*l*), and Parol Evidence given of its Contents, whether it be the Foundation of the Action, or comes in collaterally in Evidence: the subscribing Witness must prove the Delivery of the Deed, or

(*a*) 2 Roll. Abr. tit. Trial 1,
Pl. 2, page 686.

(*b*) 12 Mod. 384.

(*c*) Coop. Ch. Rep. 39.

(*d*) 1 Phill. Evid. 462. 1
Doug. 217. 7 T. R. 267.

2 East. 187. 3 Madd. 370.

(*e*) 2 Maule and Selw. 62.

(*f*) 2 Starkie N. P. 180.

(*g*) 4 East. 53. 5 T. R.
366.

(*h*) 4 East. 53.

(*i*) 1 Dougl. 216. 2 Bos.
and Pul. 85.

(*k*) Peake. N. P. 30.

(*l*) 4 Esp. N. P. 239.

the Hand-writing of the Party to an Instrument, not under Seal; and as no particular Form or Ceremony is necessary for the Delivery of a Deed, it does not seem necessary that the Witness should see the Party sign and seal; if he sees him *deliver* it already signed and sealed, or merely sealed, as his own Deed, it is sufficient (*a*); he thereby adopts the Seal and Signature (*b*): Proof, therefore, of delivery, without Proof of signing and sealing, will be Evidence of the Execution; nor would the Witness be required to prove existing Blanks not filled up; but Evidence of the *Identity* of the Party executing is necessary (*c*); and if executed under a Power of Attorney, it must be in the Name of the Principal to make him liable (*d*), and the Instrument produced and proved (*e*). If the Deed is made by a Corporation, actual delivery is not required; fixing the Corporate, or other Seal, is tantamount to delivery (*f*); and if for the latter Purpose a Letter of Attorney has been executed, the Deed is not theirs till delivered (*g*). Signing is not an *essential* Part of a Deed at Common Law, and made so only by the Statute of Frauds, and other Statutes; but *sealing is essential* to the Validity; any Number of Parties may use the same Seal, or one may seal by Consent for the others (*h*); but subscribing Witnesses are not necessary to the Validity of a Deed, if there be none, or the subscribing Witness denies all Knowledge of the Execution (*i*), or the Name of a fictitious Person is set as Witness (*k*), or the Witness,

(*a*) 2 Bos. and Pul. 217.
Peake. N. P. 146.

(*b*) 2 Ves. 257.

(*c*) Bull. N. P. 171. 4
Camp. 34. 1 Barn. and Ald.
20. 2 Starkie, N. P. 239.

(*d*) 2 East. 142. 6 T. R. 176.

(*e*) 1 Esp. N. P. 89. 116.

(*f*) Perkins, c. 2. s. 132.

(*g*) Co. Litt. 36. a n. 222.

1 Phill. Evid. 465.

(*h*) Sheph. Touch. Ch. 4.
55. Com. Dig. tit. Fait. A. 2.
4 T. R. 314.

(*i*) Peake. N. P. 146. 1
Doug. 116. 1 Black. 365.
2 Camp. 635. 7 Taunt.
251.

(*k*) 5 T. R. 371. 3 Campb.
196. Peake. N. P. 23.

when attesting, is interested and continues so (a); or has set his Name as Witness without the Knowledge or Consent of the Parties (b), or is not to be found, or heard of, nor his Hand-writing proved, or is incompetent from Infamy of Character; Excommunication does not incur any Civil Penalty or Incapacity (c), in these Cases, the Evidence of a Person present, or Proof of the Hand-writing of the Party, or his Admission of the Execution, has been held sufficient to presume that the Deed was sealed and delivered (d). And in proving the Execution of Deeds under Powers, as all the Formalities prescribed by the Power must be observed, Evidence should be given of the Number of attesting Witnesses, and of the particular Form of Attestation necessary for the Execution of the Power: *The Deeds Attestation Act* was found necessary to confirm Purchases under defective Attestations, which, it should be observed, is *retrospective* only (e). Where all the attesting Witnesses are dead, their Deaths must be proved before Evidence can be admitted of the Hand-writing of either, so if there be only one Witness; particularly if he has resided abroad (f). Where the attesting Witness is Blind (g), or incompetent from Insanity (h), or from Infamy of Character (i), or Interest acquired after the Execution of the Deed (k), or from Absence in a foreign Country (l), or out of the Jurisdiction of the Courts, and not amenable to their Process (m), or not to be found after strict and diligent

(a) 5 T. R. 571. 3 Campb. 196.

(b) 4 Taunt. 220.

(c) 53 Geo. 3. c. 127. s. 3.

(d) Peake. N. P. 145. 10 Ves. 474. 1 Campb. 70. 140. 375.

(e) 54 Geo. 3. c. 168.

(f) 2 Atk. 48. 71. Peake. Evid. 99.

(g) 1 Lord Raym. 734.

(h) 9 Ves. 381. 3 Campb. 283.

(i) 2 Stra. 833.

(k) 1 P. Wms. 287. 5 T. R. 371. 2 Esp. N. P. 697.

(l) 1 Dougl. 93. 7 T. R. 266. 1 Bos. and Pull. 361.

(m) 2 East. 250. 1 Taunt. 161. 1 Starkie, 90.

Enquiry (*a*) ; (Illness is not a sufficient Reason (*b*),) Proof of the *Witness's Hand-writing* is sufficient Evidence of the Execution ; but, unless to establish the Identity of the Party, Proof of the *Hand-writing of the Party* executing is not necessary (*c*). In some Cases, Instruments are read in Evidence without Proof of their Execution : a Deed *thirty Years old*, requires no further Proof of its Execution than the bare Production ; it is said to prove itself (*d*). If the Possession has been according to the Provisions of the Deed, livery of Seisin, though not endorsed on a Feoffment, will be presumed after such a lapse of Time ; the same Rule applies generally to all Deeds of Land, Bonds (*e*), Receipts (*f*), and all ancient Writings ; but they ought to be produced from the proper Depository : if there is any Blemish by Erasure or Interlineation, the Deed ought to be proved, though above thirty Years old, and the Blemish satisfactorily explained (*g*). *Deeds of Bargain and Sale, inrolled* pursuant to 27 Hen. 8. c. 16, have been admitted without Proof of Execution (*h*) ; but where a Deed *needs no Inrolment*, though it be enrolled, the *Inspeximus* of such Inrolment is not Evidence : an examined Copy therefore, of the Inrolment of a Bargain and Sale of Freehold in Lands, &c., is as good Evidence as the Original itself (*i*) ; but a Copy of the Inrolment is not Evidence of a Bargain and Sale of a Chattel Interest, nor of the Contents of any other Deed, *inrolled for safe* Custody, except as against the Party acknowledging the Deed ; against him and all claiming under

(*a*) 12 Mod. 607. 7 T. R. 266. 2 East. 183. 2 Campb. 282.

(*b*) 3 Campb. 458.

(*c*) 2 East. 250. 1 Bos. and Pull. 360. 1 Campb. 375. 1 Phil. Ev. 471.

(*d*) 2 T. R. 471. Bull. N. P. 255.

(*e*) 1 Esp. N. P. 275.

(*f*) 1 Atk. 44. 2 Dow. 297. 4 Barn. and Ald. 376.

(*g*) Gilb. Evid. 39. 1 Phill. Evid. 476.

(*h*) Com. Dig. B. 2. tit. Evid. 1 Salk. 280. Gilb. Evid. 86. 10 Ann. c. 18. s. 3.

(*i*) 14 East. 231. 1 Scho. and Lefr. 207. 3 Taunt. 544.

him, a Copy of the Inrolment of any Deed is admissible in Evidence (a).

The Testimony of a Witness who saw the Deed or Instrument actually signed, is the most obvious Proof of the Hand-writing; but in the Absence of positive Proof, it is the established Rule, that the Witness must have seen the Party write, and swear to his Belief, that the Signature is the Hand-writing of the Party executing (b). Where a Witness could not swear to his Belief, his Evidence was rejected (c). And so, Comparison of Hands by a Person who never saw the Party write (d); but where there has been a Course of Correspondence, Comparison of Hand-writing has been admitted, but not in the Instance of a single Letter (e). And it should seem that the Opinion of Persons of Skill may be admitted to ascertain whether Hand-writing is genuine or fictitious, but not whether the same Hand which wrote another Paper, wrote also the forged Paper (f).

Secondary Evidence of Writings will be admitted in Courts of Law, where a Deed or Instrument is in the Possession of the other Party, who refuses to produce it, after Notice, or the Original is lost, or destroyed, or has been thrown aside as useless, and a Witness believes it to be lost or mislaid (g). But if two Parts of a Deed, or more, have been executed, the Loss or Destruction of all the Parts should be proved, before Secondary Evidence of their Contents can be admitted (h); and Proof of the Execution of the Original Deed ought also to be given (i), unless such Proof

(a) 1 Phill. Evid. 484.

(f) 4 Esp. N. P. 117. 145.

(b) 1 Burr. 644. 8 Ves.
438. 474. 1 Esp. N. P. 14.

Peake. Evid. 99.

(c) 2 Starkie N. P. 164.

(g) 7 East. 66. 8 East. 278.

288. 3 Barn. and Ald. 296.

(d) Peake. Evid. 102.
105. 4 T. R. 497. Peake.

(h) Bull. N. P. 254. 4

T. R. 236.

N. P. 28.

(i) Skin. 673. 3 Taunt. 544.

(e) 3 Ves. and Bea. 172.

would be dispensed with, if the Original was produced, or by the Original being kept back by the other Side, Execution would be presumed (*a*); the Party, after accounting for the Absence of the Original, by proving its Loss or Destruction, or Refusal to produce it after Notice, may read a *Counterpart*; or if there be no Counterpart, *an examined Copy*, or if he has no examined Copy, *Parol Evidence* may be given of its Contents (*b*): the Counterpart of a Deed has been received in Evidence against the Person who signed, and against his Assignee, without Notice to produce the Original; as in the Instance of an Ejectment against an Assignee for Non-payment of Rent, Proof of the Counterpart executed by the Original Tenant, was held sufficient Evidence of the Assignee's holding on the same Terms (*c*): and where a Party had fraudulently got Possession of a written Instrument from a third Person, after a Suit commenced, it having been secreted in Fraud of the Subpœna, *Parol Evidence* was admitted of its Contents, though no Notice of Production had been given (*d*). Where one Deed *recites* another, the Recital has been held to be sufficient Evidence of the recited Deed, if the Original be lost, against the Party to that wherein it is recited, or against any one claiming under him; but as against a Stranger, Evidence of the actual Execution of the first Deed must be given: and a Work of great Authority has stated, that as against the Party to the reciting Deed, it is only Secondary Evidence, and not admissible, unless the first Deed is shewn to be lost, or the non-Production accounted for (*e*). When Possession has gone along with a Deed during many Years, the Original of which is lost or destroyed, an old Copy or Abstract

(*a*) 1 Esp. N. P. 410.

(*d*) 4 Esp. N. P. 256.

(*b*) 2 Atk. 71. 1 Campb. 192. 309. 501. 1 Starkie N. P. 167.

(*e*) Com. Dig. tit. Evidence, B. 5. 1 Salk. 286. Gilb. Evid. 100. 2 Lev. 108. 6

(*c*) 7 East. 763. 8 East. Mod. 45. Peake. Evid. 108. 487.

may be given in Evidence, though not proved to be true, because in such Case, it may be impossible to give better Evidence (*a*). Secondary Evidence has also been admitted of ancient Documents (*b*).

All Devises and Bequests of Lands or Tenements, devisable by the Statute of Wills (*c*), or by the Statute of Frauds (*d*), or by any particular Custom, must be in Writing signed by the Party devising, or some other Person in his Presence, and by his express Direction, and attested and subscribed in his Presence, by three or four credible Witnesses, otherwise to be void and of no effect. *Copyhold*, or *Customary Lands*, or mere Chattel Interests, (unless where a Term is assigned to attend the Inheritance) are not within these Statutes, but any Estates for Years, or otherwise carved out of a Freehold, are subject to the Provisions. By a late Act (*e*), the Disposition of Copyholds by Wills, will be effectual without a previous Surrender to the Use of the Will:

Of the Proof of Wills, the best Evidence of the Contents is the Original Will itself. An Exemplification is not Evidence at Law (*f*); nor the Probate of a Will any Proof of the Devise of a real Estate: where a Will of Lands, after Search at the Commons, is shewn to be lost, an examined Copy may be given in Evidence; and where neither the Original nor Copy can be found, Parol Evidence of the Contents by a Person who heard it read at the Funeral has been received (*g*). The Execution of a Will is to be proved by the subscribing Witnesses, if they are alive, and can be produced; in the Courts of Law all the Circumstances may be proved by one Witness, if there are two others, who would be allowed to give the same Testimony (*h*); but on

(*a*) Bull. N. P. 254. 6
Madd. 59. 1 Phil. Evid. 458.

(*b*) 2 Price, 399. 4 Dow.
298. 324.

(*c*) 32 Hen. 8. c. 1. explained by 34 Hen. 8. c. 5.

(*d*) 29 C. 2. c. 3. s. 5.

(*e*) 55 Geo. 3. c. 192.

(*f*) Comberb. 46.

(*g*) 2 Campb. 389.

(*h*) 2 Stra. 1254. Bull.
N. P. 264.

the Trial of an Issue directed by the Court of Chancery, all the attesting Witnesses must be examined (a); that Court has no Jurisdiction to determine the Validity of a Will, either of Real or Personal Estate (b). The Original Will must be produced, and the Facts to be proved at Law by the subscribing Witness are, *that the Devisor signed the Will, or that another Person signed it in his Presence, and by his express Direction, and that the Witness, and two others, attested and subscribed in the Presence of the Testator* (c); but where the Witness can only prove his own Share in the Transaction, all the other Witnesses must be called, and so where the Will is disputed. And it is not material in what Part of the Will the Testator writes his Signature; if he writes his Will himself, beginning “I, A. B.” this is sufficient, though he does not sign his Name at the Bottom (d); where, however, a Will consisted of several distinct Sheets of Paper, some of which the Testator had signed, and intended to sign the Rest, but was not able, this was held not sufficient to give Effect to an Instrument which the Testator himself did not think fully completed (e): the *Mark of those who cannot write* has been held a sufficient signing (f); but *sealing* alone without signing, is not a sufficient Execution of a Will (g); the subscribing Witnesses are to attest the Signing, but the subscribing Witnesses need not see the Act of signing: it will be sufficient, if the Testator has acknowledged to them, either to each separately, or to all at the same Time, that the Will is his, or that the Signature is his Hand-writing (h); nor is it necessary that the

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| (a) Coop. 136. 19 Ves. 502.
1 Wils. 276. | (f) 9 Ves. 248. 4 Burn.
Ecc. L. 92. |
| (b) 3 Meri. 161. | (g) 1 Wils. 313. 2 Atk.
176. 2 Ves. 459. 1 Ves. j. |
| (c) 1 Phil. Evid. 501. | 11. 17 Ves. 458. 18 Ves.
219. Peake. Evid. 383. 9 175. |
| (d) 3 Lev. 1. 86. 3 Mod.
Ves. 248. 18 Ves. 183. 1
Phill. Evid. 501. | (h) 3 P. Wms. 253. 2 Ves.
454. 1 Ves. j. 11. 8 Ves.
504. 1 Ves. and Bca. 362. |
| (e) Dougl. 241. | |

subscribing Witnesses should express in their Attestation that they subscribed their Names in the Presence of the Testator, whether they did so would be a Question of Evidence (*a*); but unless they all attest the several Instruments, and that whereby the Lands are required to pass, the Requisites of the Statute are not complied with, though the Testator intended to confirm the first (*b*). The Execution of Wills under Powers, requires that all the Formalities prescribed by the Power should be most strictly observed (*c*). The Statute requires the Witnesses to attest the Signing, and to subscribe, but not that they should be all present at the same Time: and it seems to be decided that the Witnesses may subscribe at several Times (*d*). And an *Attestation by a Mark* has been adjudged a valid Subscription within the Statute (*e*); nor does it seem necessary that the Testator should declare the Instrument executed by him to be his Will, or that the Witnesses should attest, or be shewn every Page (*f*); but the whole Will must be present at the Time of Attestation. Where a Will has been written upon distinct Pieces of Paper, if the last Piece of Paper only be attested by three Witnesses, none of whom saw the first, this would be a defective Execution (*g*); but unless it be expressly proved, the Presumption is in favour of the Will (*h*). Where several Writings were made on the same Piece of Paper, and it was shewn that all were intended to form but one Will, and not a Will and Codicil, the Execution of the Last has been held to be an Execution of the Whole (*i*). And an unfinished Alteration by the Testator

(*a*) Willes's Rep. l. 4 Taunt.
217.

(*b*) Peake. Evid. 387. Pre.
Ch. 270. Com. Rep. 384.

(*c*) 1 Phill. Evid. 466.

(*d*) Pre. Ch. 185. 2 Atk.
177. n. 2 Ves. 458. 1 Ves.
jun. 14.

(*e*) 8 Ves. 185. 504.

(*f*) 3 Burr. 1773. 1 Bl.

Rep. 407. 422. 452.

(*g*) 3 Mod. 262. 1 Eq.
Ca. Abr. 403.

(*h*) 3 Burr. 1773.

(*i*) 1 Burr. 549.

is not a Cancelling of the Will (*a*). The Witnesses are to attest and subscribe in the Presence of the Testator ; but if he were in a State of Insensibility, it would be impossible for him to see the Witnesses subscribe (*b*) ; it is sufficient if the Testator was in a Situation to see, not that he should actually see them sign (*c*) : if the Witnesses are dead, or Insane, or Abroad, their Hand-writing, and the Hand-writing of the Testator must be proved (*d*). A *defective Attestation* will not conclude a Jury from finding that a Will has been properly made and published (*e*) : if a subscribing Witness should deny the Execution of the Will, he may be contradicted ; or if he impeaches the Will on the Ground of Fraud, and implicates other Witnesses who are dead, Evidence will be received of their general good Character (*f*). And if all the Witnesses impeach the Will, Circumstantial Evidence would be admitted to prove the due Execution (*g*). *Lord Eldon* has expressed an Opinion, that a Will thirty Years old, if there has been Possession under it, proves Itself, when the Attestation records the Fact of the Signing of the Witnesses in the Testator's presence ; and if the latter be not sufficiently recorded, yet that the Fact of Possession under the Will, and claiming and dealing with the Property as if it passed under the Will, would be strong Evidence to prove the duly Signing by the Witnesses (*h*). A distinguished Work lays it down as a general Rule, that a Will thirty Years old, unless there has been Possession under it, ought to be proved like any other Will (*i*).

(*a*) 2 Brod. and Bin. 650.

(*b*) 1 Dougl. 241.

(*c*) 2 Salk. 687. 3 Salk. 395. 1 Bro. C. C. 99. 1 Maule and Sel. 294.

(*d*) 2 Com. Rep. 530. 2 Stra. 1109. Willes's Rep. 1. 6 Dow. 202.

(*e*) Ibid.

(*f*) 4 Esp. N. P. 50. 1 Campb. 210.

(*g*) Bull. N. P. 264. 2 Stra. 1096. 1 Black. Rep. 365. 19 Ves. 507.

(*h*) 6 Dow. 202.

(*i*) 1 Phill. Evid. 508.

It is a general Rule of Law, that *Parol Evidence cannot be admitted to contradict, add to, or vary, the Terms of a Will, Deed, or other written Instrument*: where Ambiguities arise in written Instruments, they may be *explained* by Evidence; but a Distinction has been made between *Ambiguitas latens*, and *Ambiguitas patens*, the two Kinds by which Ambiguities have been distinguished: the First occurs where the Deed or Instrument appears on the Face of it, free from Ambiguity; but the Meaning being rendered uncertain, by Evidence of an extrinsic or collateral Matter, so as to deprive the Instrument of any Operation whatever, the Ambiguity which is raised may be dissolved by Parol Evidence. Where a Person grants his Estate of Blackacre to one and his Heirs, and he has two Estates of Blackacre, the Ambiguity arises from an extrinsic Fact or Circumstance *dehors*, and the Admission of Evidence to explain the Ambiguity is necessary to give Effect to the Grant, and to shew which of the two Estates the Party intended to convey (a). So, where a Testator bequeathed his Stock in a particular Fund, and it appeared that he had not, at the Time of making his Will, or afterwards, any Stock in that Fund, having sold it out some Time before, and purchased into another Fund; here there was no Ambiguity on the Face of the Will, but the *latent Ambiguity* was introduced by extrinsic Evidence, and the like Evidence was admitted to shew whence the Mistake arose, and the Legacy was satisfied out of the new Fund, into which the Testator had purchased (b). But the Admissibility of Parol Evidence in such Cases, will depend upon whether such Evidence was necessary to give Effect to the Grant or Will, or whether, without it there appears sufficient to satisfy the Terms of the Grant or Bequest, and the Intention of the Party. Where the extrinsic Circumstances do not go to that Ex-

(a) Bacon's Elem. Rule. 23. (b) 3 Ves. 306. 4 Ves.
 1 T. R. 701. 1 Ves. j. 259. 676. 1 Bro. C. C. 472. 1 Cox.
 412. 1 Meri. 384. 425.

tent, collateral Evidence has been refused (*a*). A Distinction has been made where the Description of the Thing granted, or devised, is sufficiently clear, but afterwards some unnecessary Words are added: if the Grant is in *general Terms*, the Addition of a particular Circumstance will operate by way of Restriction and Modification, but where there is a Grant of a *particular* Thing, once sufficiently ascertained by some Circumstance belonging to it, the Addition of an Allegation, mistaken or false, will not frustrate the Grant (*b*); as in the Instance of a Grant of all the Grantor's Tithes within a particular Parish, to which are superadded, *all which were lately in the Possession of M. P., deceased*; the whole of the Tithes within that Parish have been holden to pass, though they had never been in the Possession of M. P. (*c*). *Ambiguitas Patens*, that which is apparent on the Face of the Deed, or Instrument itself, may be helped, by Construction, or, in some Cases, by Election, but never by Averment, or Parol Evidence; for, says *Lord Bacon*, that were, in effect, to make that pass without Deed, which the Law appoints shall not pass, but by Deed (*d*). If a Clause in a Will, or other written Instrument, be so ambiguously or defectively expressed, that in putting a Construction upon it, the Intention of the Party cannot be collected, Parol Evidence of his Declarations cannot be admitted to remove the apparent Ambiguity, and to explain his Intention, and the Clause would be void for Uncertainty (*e*); but the general Intention, from other Passages, has been, in some Instances, collected; and the apparent

(*a*) 11 East. 441. 3 Taunt.
147. 4 Maule and Sel. 550.
2 Meri. 419. 4 Dow. 65.

(*b*) 5 East. 51. 2 Rolls
Abr. 52. pl. 26.

(*c*) T. Jones, 455. 1 Maule
and Selw. 299. 1 Barn. and
Ald. 550.

(*d*) Bacon's Elem. Rule 23.
Peake. Evid. 120. 1 Ves. j.
259. 2 Meri. 343.

(*e*) 8 Rep. 155. a. 2 Vern.
624. 2 Ves. 217. 1 Phill.
Evid. 544.

Ambiguity explained by Reference to some Event, or to another Writing, or other Medium of Explanation adverted to in the Will or Instrument, so as to make the whole consistent. A Blank in a Will, for the Devisee's Name, is an Instance of apparent Ambiguity, and Parol Evidence cannot be admitted to shew what Person's Name the Testator intended to insert (*a*). If the Description in the Will is shewn by Initials, or is such as the Testator had used, to designate the Legatee or Devisee, Parol Evidence would be admitted (*b*); but Parol Evidence is never allowed to shew the Intention of a Testator against the Construction on the Face of the Will (*c*). An Omission or Mistake in a written Instrument, made expressly to record a Fact; if a Blank appears in a material Part, may be supplied by Parol Testimony (*d*): as in a Surrender of a Copyhold, made by a Steward, a Mistake in the Entry, being only Matter of Fact, Parol Evidence that there was a Mistake, either as to the Land or Uses, has been admitted (*e*): if Doubts arise as to the Construction and Meaning of ancient Deeds and Instruments, Words are to be understood as to their common and general Acceptation at the Time when made, and the Nature of the Subject; uniform and immemorial Usage which has prevailed under them, is received as Evidence of the Original Intention of the Parties (*f*). Both *Private Deeds*, and the *King's Charters*, have been so expounded (*g*); but Legal Instruments are not to be construed by the equivocal Acts of the Parties; a Covenant for Renewal in a Lease, has been decided not to give a

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| (<i>a</i>) 2 Atk. 239. 3 Atk. 257. 3 Bro. C. C. 311. Bull. N. P. 298. 5 Ves. 148. | (<i>e</i>) 2 Vern. 98. 547. |
| (<i>b</i>) 1 P. Wms. 425. 4 Ves. 680. 3 Ves. 148. 2 Eden. 194. 5 Madd. 118. 1 Cox. 425. | (<i>f</i>) Vaughan, 169. 3 Atk. 576. 3 T. R. 279. 288. 4 T. R. 810. Cowp. 248. 4 East. 327. 10 Ves. 335. 6 T. R. 397. |
| (<i>c</i>) 8 Ves. 22. | (<i>g</i>) 6 T. R. 388. |
| (<i>d</i>) 1 Wils. 215. | |

Right for perpetual Renewal (a). And in the Construction of Wills and Deeds, the State of the Property, and the Situation and Circumstances of the Parties, are to be taken into Consideration (b).

Where a written Agreement has been varied by Parol, and such Variation has been, so far in *Fact performed*, as to have laid a Ground for a specific Execution, if it had formed a Part of the Original Agreement, Parol Evidence will be admitted of the subsequent Variation: and as to what constitutes a Part-Performance, the Noble and Learned Author so often alluded to, has laid down the Rule, "*that nothing is to be considered as Part-Performance, which does not put the Party into a Situation, that is a Fraud upon him, unless the Agreement is performed*;" as in the Instance of a Person let into Possession, upon a Parol Agreement; he is made a Trespasser, and liable to answer as such, if there is no Agreement" (c).

The Statutes of Wills gives the Power of devising Lands by Will in Writing; and the Statute of Frauds, enacting that all Devises of Lands and Bequests of Personal Property must be in Writing: at Law, Parol Evidence of the Testator's Intention, cannot be admitted to controul or enlarge the Terms of a Will (d). In Courts of Equity, Provisions in Wills have, in certain Cases, been enlarged by Parol Evidence and Trusts raised, as against Executors, or other Persons claiming an Interest under Wills: where it has appeared that the Testator intended to make a further Provision in his Will, but omitted to insert it on receiving a Promise that, notwithstanding such Omission, his Intention should be carried into effect (e): And for the Purpose of setting aside

(a) Cowp. 819. 3 Ves. 295. (c) 1 Sch. and Lefr. 41.
6 Ves. 232. 7 East. 237. 14 Ves. 388.

2 N. R. 449. (d) Plowd. Com. 345. 5

(b) 3 Bro. P. C. 79. 1 Rep. 68. 2 Vern. 333.

Brod. and Bing. 551. 1 Bro. (e) 2 Vern. 506. 3 Ves.
C. C. 472. 3 Meri. 319. 152.

a Will, on the Ground of Fraud, Parol Evidence may be given of what passed at the Time of the Testator's signing, and what the Testator said: where it was proved that the Testator, at the Time of the Execution of his Will, asked whether the Contents were the same as those of a former Will, the Answer to which was in the Affirmative, when in fact the Contents were different; the Will was set aside for Fraud (*a*). Parol Evidence is not admissible to contradict a Will, nor to shew the Intention of a Testator against the Construction on the Face of the Will (*b*); nor an Intention to exempt the Personal Estate from Debts (*c*), or not to revoke a Will (*d*). Parol Evidence has been admitted to shew that the Instrument is not the Will of the Testator, as to a particular Estate, but not for the Purpose of setting up the disappointed Intention of the Testator (*e*). Where there is no express Declaration of making the Executor a Trustee of the Residue, and Circumstances afford an Inference or Presumption of Trust, Parol Evidence has been admitted to rebut such Inference or Presumption (*f*). So, where the Executor took by Will, general and specific Legacies, but not for Care and Pains, Parol Evidence has been admitted of the Intention, that he should take the Residue beneficially (*g*); but a Legacy expressly for his Care and Pains, is a Declaration of Intention, not to have the Benefit, and Parol Evidence is not admissible to contradict the Intention (*h*): if there is no apparent Intention on the Face of the Will, to exclude the Executor from the Residue, Parol Evidence of such Intention is not admissible (*i*): nor to explain a Will, where the Presumption is not raised (*k*);

(*a*) 8 T. R. 147.

(*f*) 5 Madd. 58.

(*b*) 2 Vern. 98. 8 Ves. 22.
2 Sch. and Lefr. 240.

(*g*) 17 Ves. 435. 2 Meri. 6.
19 Ves. 641.

(*c*) 2 Ridgw. P. C. 21. 44.
1 Eden. 38.

(*h*) 17 Ves. 443.

(*i*) 19 Ves. 643. 2 Meri. 17.

(*d*) 3 Ves. 650.

(*k*) 3 Ves. and Bea. 72.

(*e*) 5 Madd. 365.

Cowp. 59.

and it is admissible only where an Ambiguity is raised by extrinsic Circumstances (*a*): and where extrinsic Evidence is admitted, the Will must not be construed by Matter posterior to its Execution (*b*). And in construing a Will, the State of the Testator's Family, at the Time of making the Will, may be taken into Consideration (*c*). And it is competent for the Court to go out of the Will to ascertain the State of the Testator's Family, and his Knowledge of it, with respect to the Disposition made (*d*). Parol Evidence is not admitted to alter the Effect of a Will (*e*); nor to construe a Will, unless to shew with reference to what the Will was made (*f*). It has been admitted to fortify the Presumption of a Legacy being adeemed (*g*), but such Presumption may be rebutted by Parol Evidence (*h*).

Parol Evidence cannot be admitted to contradict a Contract in Writing (*i*), nor to vary or add to the Terms of a Written Instrument or Agreement (*k*); nor of an Agreement at the Time of making, to renew a Bill or Promissory Note, and not to demand Payment when due (*l*); or, if made payable on Demand, to be so on a Contingency (*m*); or, though payable on a Day certain, to be made payable at some other Day (*n*). But Parol Evidence has been admitted in opposition to a specific Performance of a Written Contract, on the Ground of *Mistake or Surprise*, as well as *Fraud* (*o*); and to rebut an Equity or Presumption (*p*).

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| (<i>a</i>) 4 Dow. 93. | 3 Bro. C. C. 388. | 5 Ves. |
| (<i>b</i>) 1 Ves. 475. | 2 Ves. | 688. |
| and Bea. 199. | (<i>l</i>) 3 Campb. 57. | 1 Taunt. |
| (<i>c</i>) 3 Dow. 68. | | 347. |
| (<i>d</i>) 1 Ball. and Bea. 481. | (<i>m</i>) 1 Starkie N. P. 361. | |
| (<i>e</i>) 16 Ves. 481. | 3 Barn. and Ald. 233. | |
| (<i>f</i>) 15 Ves. 514. | (<i>n</i>) 1 Moore, 535. | 8 Taunt. |
| (<i>g</i>) 1 Ball. and Bea. 298. | | 92. |
| (<i>h</i>) 1 Ball. and Bea. 303. | (<i>o</i>) 1 Ves. and Bea. 524. | |
| (<i>i</i>) 2 Atk. 383. | 5 East. 10. | 7 Ves. 211. |
| 1 Cox. 15. | | 1 Sch. and Lefr. 38. |
| (<i>k</i>) 1 Ves. jun. 241. | 333. | 6 Ves. 328. |
| | | 1 P. Wms. 114. |
| | (<i>p</i>) 1 Ves. 457. | 2 Ves. 28. |

And it has been admitted to explain the Terms of an ambiguous Written Agreement, but not to extend them, nor to explain a Deed, unless Fraud or Misrepresentation affords a Ground (*a*); nor to vary an Agreement, though it may be for the Purpose of raising an Equity, founded on the Agreement, by Proof of collateral Circumstances, or to prove the Waiver of a Written Agreement (*b*); nor to alter an Agreement; nor, by the Rule of Law, independent of the Statute of Fraud, to contradict a Written Agreement (*c*). But the Rule that a Written Agreement, within the Statute, cannot be varied by Parol, does not affect a subsequent, distinct, and collateral Agreement (*d*). Declarations of a Party to a Deed, *previous* to the Execution, have been admitted in support of it, against Imputations of Fraud, but not subsequent (*e*). Whatever is wanting to shew the Consideration, and from whom it moves, may be supplied by Evidence *dehors*, where it does not contradict the Deed (*f*). A Deed may be impeached by Matter *dehors*, upon Averment of Illegal and Corrupt Consideration; and it cannot be supported by Evidence of Consideration different from that alledged in it (*g*). Parol Evidence is admissible to shew under what Circumstances a Bond or Deed was executed, and the Destruction or Contents of a Deed (*h*); and that a Conveyance which was absolute, was meant as a Security only, where the Written Evidence shewed it was not such as was intended (*i*), and to prove Fraud in procuring, and the attendant Circumstances (*k*), and that a Party to a Deed had Notice of an Incumbrance on the Estate. If a

(*a*) 1 Bligh. 287.

(*f*) 17 Ves. 192.

(*b*) 1 Ccx. 402. 3 Meri. 43.
5 Ves. 688.

(*g*) 13 Ves. 318. 2 Sch.
and Lefr. 501.

(*c*) 3 Atk. 383. 1 Cox. 219.
3 Ves. 34. 7 Ves. 219. 1
Ball. and Beat. 303.

(*h*) 1 Ball. and Beat. 14.
Ambl. 247.

(*d*) 6 Ves. 337.

(*i*) 4 Bro. C. C. 472.

(*e*) 5 Ves. 790.

(*k*) 2 Ball. and Beat. 17
1 Bro. C. C. 340.

Deed is founded on Usurious, or other Illegal Consideration, this may be shewn by Parol Evidence, though on the Face of the Deed it appears Fair and Legal (*a*). And the Party who complains of the Fraud, may prove any Consideration to shew the fraudulent Nature of the Transaction. Parol Evidence is not admissible to shew that a Person agreeing to purchase an Estate, in his own Name, had in fact purchased it on behalf of another (*b*); nor to prove Verbal Declarations of an Auctioneer at a Sale varying, adding to, or explaining the Printed Conditions; nor an Agent's Representations at another Time, which do not bind the Principal (*c*); but on the Ground of Fraud, Parol Evidence has been admitted, in opposition, but not to enforce, a specific Performance (*d*); but not to prove an Agreement upon the Purchase of an Annuity, that it should be redeemable (*e*). Parol Evidence has been admitted to ascertain a Person, where there were two of the same Name, or a Mistake in the Name (*f*): and in a resulting Trust of Personal Estate, where the Executor had a small Legacy, and the Next of Kin claimed the Residue, to ascertain who should have it, and the Thing bequeathed (*g*): and upon Questions as to the Satisfaction of Portions, that a Portion should not be taken in Performance of a Legacy, and that Legacies, by a second Codicil, were Cumulative (*h*). Evidence in Writing, admissible as an Agreement, unstamped, does not prevent Parol Evidence if otherwise admissible (*i*).

Presumptions prevail only where there is no Evidence to

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| (<i>a</i>) Bull. N. P. 173. 2 | (<i>f</i>) 2 P. Wms. 136. 2 Atk. |
| Wils. 347. 4 Bro. P. C. 240. 1 Ves. 166. | |
| 234. | (<i>g</i>) 1 Bro. C. C. 472. 2 |
| (<i>b</i>) 1 Cox. 15. | Atk. 69. 99. Ca. Temp. Tal- |
| (<i>c</i>) 4 Esp. N. P. 74. 135. | bot. 240. |
| 2 Camph. 555. | (<i>h</i>) 3 Ves. 516. 630. 7 Ves. |
| (<i>d</i>) 1 Ves. and Bea. 375. | 508. 9 Ves. 577. 2 Bro. |
| (<i>e</i>) 2 Bro. C. C. 219. 1 Ves. | C. C. 165. 521. 1 Ves. j. 390. |
| 241. | (<i>i</i>) 13 Ves. 114. |

rebut them; and though they arise from the usual Construction of a Deed, or other Written Instrument, the general Presumption may be shewn as not applicable in the particular Instance; where a Person levies a Fine, and no Deed is executed to declare the Uses, the Presumption is, that it was done to secure the Estate, and it enures to his own Use; but *Parol Evidence* has been admitted to rebut this Presumption, and vest the Estate in the Conusee: though, by the Statute of Frauds, Uses to third Persons must be declared by Writing, signed by the Party (a): but where a Person, after making his Will, executes Deeds, by which he takes a new Estate, *Parol Evidence* cannot be received to shew that the Testator meant his Will to continue, because the Will is not revoked on the Ground of Intention, but by the Statute of Wills, it could never operate on any Estate acquired after it was made (b).

All Witnesses interested in the Event of a Cause, are to be excluded from giving Evidence in favour of the Party to which their Interest inclines them (c). To disqualify a Witness, on the Ground of Interest, the Objection must be a strictly Legal Objection (d); the Witness must be proved to have a direct and immediate Interest in the Event of the Suit: any less Degree of Interest, such as a *fancied Obligation* of Honour to indemnify one of the Parties, or *strong Wishes*, or *Bias*, on the Subject-Matter of the Suit, or even an *Expectation* of deriving some Benefit from the Result, or the *Liability to Actions* in a certain Event (e): however great an Influence these may have on the Witness, or may furnish a strong Argument against his Credibility, they do not form any solid Objection to his Competency.

(a) Gilb. Cases, 16. 1 Dougl. 129. Peake Ev. 141. 1 Phill. 25. 29. Car. 2. c. 3. Ev. 47. 54.

(b) Peake Evid. 120.

(e) 1 P. Wms. 287. Gilb.

(c) 1 Phill. Ev. 45. Peake Ev. 106. 1 T. R. 163. 1 Ev. 141. Stra. 129.

(d) 1 Campb. 145. 1 Stra.

On the broad Ground of Interest, it seems to be now established, that the Witness must derive a certain *immediate Benefit or Disadvantage* from the Determination of the Cause, one way or the other, to exclude him from giving Evidence, however small and inconsiderable the Interest may be (*a*); and the Interest must be coeval with the Time, when the Fact, which the Witness is to prove, happened, or be cast upon him afterwards by Operation of Law, or by the Act of the Party requiring his Testimony; for if, after the Event, the Witness makes himself a Party in Interest by his own Act, without the Interference or Consent of the Party to whom he is produced, it should seem such subsequent Interest will not affect his Competency (*b*); and the Interest must continue to the Hearing; and in those Cases, a general Release of all Actions, &c., down to the Date of it, tendered by the Party to the Witness, or by the latter to the Party, and produced in Court (*c*), though it be not accepted, restores the Competency (*d*). An Objection, in respect of Interest, may in some Cases, be taken out of the Rule by a Counter-Interest; where the Interest of the Witness, in the Event of a Cause supported by his Evidence, is counteracted by an equal or greater Interest, that it should be decided otherwise (*e*). So, where the Witness stands indifferent between the Parties (*f*). But it should seem that an interested Witness is objectionable only, when he is produced to prove a Fact consistent with his Interest; for if the Evidence he is to give be contrary to his Interest, he is the best Witness, and no Objection can be made by a Party in the Cause (*g*). Cross-examining a Witness in

(*a*) Gilb. Ev. 106. 3 T. R. 27. 35. 7 T. R. 481. 1
27. Peake Ev. 141. Campb. 249.

(*b*) Skin. 536. 1 Stra. 652. (*e*) Gilb. Evid. 129. 6 Mod.
Cowp. 736. Peake Ev. 152-3. 307. 2 East. 458. 1 Burr. 422.

(*c*) 1 Campb. 37.

(*f*) 7 T. R. 481. n. 1 Star-

(*d*) Dougl. 139. 3 T. R. kie, 27. (*g*) Salk. 691.

Equity, is not a Waiver of Objection on the Ground of Interest, to the Competency of the Witness (*a*). It seems, in a Court of Law, the Objection to the Competency may be taken at any Time during the Trial, and is waived by pursuing the Cross-examination (*b*). There are Cases, where Persons substantially interested, as Servants to prove the Delivery of Goods, or Payment of Money, and even Parties to a Suit have been admitted, from Necessity, and from the Impossibility of obtaining other Testimony; and where the Possibility of Interest has been very remote (*c*): on a Prosecution for a Cheat (*d*), or for Perjury in an Answer in Chancery, the Person aggrieved has been held a Competent Witness (*e*). So, the Person who has borrowed Money on an Usurious Transaction, in an Action for the Penalties, though the Money remains unpaid (*f*): Forgery is considered as an anomalous Case (*g*); but in a Civil Suit, if a Question arise collaterally or incidentally, as to the Genuineness of a Written Instrument, the Person whose Name has been forged, is competent without a Release, to prove the Forgery (*h*). In releasing a Witness, it may be useful to observe, that a Release of a Bond Debt *by* one of several Obligors, operates as a Release by all (*i*); and a Release *to* one of several Obligors, will enure to all the others, whether the Bond be Joint, or Joint and Several (*k*). Excommunication does not incur any Incapacity, or Civil Penalty, except Imprisonment for six Months (*l*).

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| (<i>a</i>) Coop. 300. | (<i>f</i>) 4 Burr. 2251. 7 T. R. |
| (<i>b</i>) 19 Ves. 434. Peake | 60. 2 T. R. 496. |
| Ev. 182. 1 Phill. Evid. 130. | (<i>g</i>) 4 East, 582. |
| 1 T. R. 720. | (<i>h</i>) 4 Barn. and Ald. 209. |
| (<i>c</i>) Peake Ev. 146. 2 Stra. | Bull. N. P. 289. 2 Bos. and |
| 647. 2 Lev. 231. | Pull. 57. 374. |
| (<i>d</i>) 1 Salk. 286. 1 Ventr. 49. | (<i>i</i>) 7 Mod. 250. |
| (<i>e</i>) 4 Burr. 2255. 4 East, | (<i>k</i>) 1 Roll. Abr. 412. G. |
| 581. 1 Campb. 9. 151. 1 | (<i>l</i>) 53 Geo. 3. c. 127. s. 3. |
| Taunt. 520. | |

A Co-Plaintiff, though only a Trustee, cannot be examined as a Witness for a Plaintiff (*a*), but he may be examined as a Witness for a Defendant (*b*). And a Defendant has been allowed to examine a Plaintiff, and Co-Assignee (*c*). A Plaintiff cannot be made a Witness, a Defendant may, because he is forced into the Suit (*d*): one Defendant may be examined on behalf of another Defendant (*e*), but not if, by any Possibility, he may be liable to Costs, especially if he be a Trustee (*f*). A Prochein-Ami cannot be examined as a Witness, nor the Guardian of an Infant, nor the Wife of a Prochein-Ami, or Guardian, because liable to Costs (*g*): nor can Husband or Wife give Evidence against each other (*h*). A Trustee, though he has the Legal Estate, may be examined by Order (*i*). So a Grantee, who appears to be a bare Trustee, to prove the Execution and the Merits or Intention of a Deed to himself (*k*); but an Executor or Administrator in Trust cannot (*l*). A Witness, disinterested at the Time of his Examination, and becoming interested afterwards, has been held to be a good Witness, and his Deposition read (*m*). So a Witness releasing his Interest (*n*), but the Release must be general, and produced (*o*). The mere Interest an Auctioneer derives from his Commission, will not defeat his Evidence, as it is a known Interest (*p*). A Person who can recover Nothing, is a Competent Witness (*q*); and a

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| (<i>a</i>) 1 Vern. 20. | (<i>i</i>) 3 P. Wms. 181. 3 Atk. |
| (<i>b</i>) 2 Atk. 229. Ambl. 393. | 95. 604. |
| (<i>c</i>) 1 P. Wms. 596. n. | (<i>k</i>) 1 P. Wms. 288. 2 Atk. 229. |
| (<i>d</i>) Pre. Chan. 411. | (<i>l</i>) 2 Atk. 299. |
| (<i>e</i>) 2 Ch. Ca. 24. | (<i>m</i>) 1 P. Wms. 208. 2 Atk. |
| (<i>f</i>) 3 Atk. 401. 1 Atk. 204. 2 Bro. C. C. 330. | 615. |
| (<i>g</i>) 3 Atk. 511. 547. 1 Cox. 286. | (<i>n</i>) 2 Ventr. 472. |
| (<i>h</i>) 13 Ves. 144. 3 Ves. and Bea. 166. | (<i>o</i>) 2 Atk. 15. 3 Bro. C. C. 370. |
| | (<i>p</i>) 13 Ves. 474. |
| | (<i>q</i>) 1 Ves. j. 61. |

Party having examined a Witness, cannot afterwards discredit him (*a*). An Objection to Competence is not waived by Cross-examination (*b*).

A Father coming to bastardize his own Issue, is a legal, though a very suspicious Witness (*c*). The Evidence of a Bond-Creditor is not admissible to obtain a Decree for payment of Legacies (*d*). The *Attorney* or *Solicitor* of a Party in a Cause may be examined, like any other Witness, as to a Fact which he knew, before the Retainer, in his Professional Character (*e*); or where he has made himself a Party to the Original Transaction, as in attesting a fraudulent Deed (*f*), or to a collateral Fact, within his own Knowledge, or which he might have known, without being interested, as Attorney in the Cause, as subscribing Witness to a Deed to prove the Execution (*g*), or that his Client was sworn to an Answer in Chancery; or as to an Erasure in a Will or Deed, if he had seen it in any other State; but he is neither *obliged* nor *permitted* to disclose, a Confession on the Subject by the Client (*h*): but Propositions of Compromise, intrusted to an Attorney, to make to the adverse Party, though not disclosed by the Attorney, may be proved by a Witness who heard them delivered (*i*). And a Plaintiff's Attorney in an Action at Law, has been admitted to prove that the Bond in Suit had been given on an Usurious Consideration (*k*); and where, after a Compromise, the Plaintiff had informed his Attorney exultingly, that no Consideration had been given for the Note in Question, the Court of

(*a*) 7 Ves. 290.

(*b*) 19 Ves. 433.

(*c*) 1 Ves. j. 134.

(*d*) 2 Ves. j. 11.

(*e*) Bull. N. P. 284. 4 T. R. 759.

(*f*) Peake N. P. 108. 5

Esp. N. P. 52. Cowp. 845.

2 Brod. and Bing. 5.

(*g*) 1 Phill. Evid. 143. 4

Esp. N. P. 235.

(*h*) Bull. N. P. 284. 1 Ventr. 197. Cowp. 846.

(*i*) 2 Camph. 10.

(*k*) Peake N. P. 108.

King's Bench decided that the Attorney was compellable to disclose that Circumstance in an Action to recover back the Money (*a*). If a Foreigner, communicating with his Attorney, has recourse to an *Interpreter* (*b*), or to an *Agent* (*c*), they are equally bound to Secrecy. A learned and distinguished Author has observed, that the Privilege of not being examined to Professional Communication is the *Privilege of the Client, and not of the Attorney*, it never ceases, not even after his Dismissal (*d*): it is not sufficient to say the Cause is at an end, unless the Client waives the Privilege, the Mouth of a Counsel, Attorney or Solicitor *is shut ever* (*e*).

It is an established Rule in Courts of Equity, that on Suits for *Relief*, where the Facts charged by the Plaintiff, as the Ground for a Decree, are proved only by a *single Witness*, and are clearly, positively, and in *express Terms*, denied by the Defendant's Answer, no Decree for Relief can be made (*f*); *unius responsio non omnino audiatur*; but where the Evidence produced by the Plaintiff is so far supported and corroborated by Proof of concurring Circumstances, as to outweigh the Denial in the Defendant's Answer (abstracting from the Mind that the Evidence on the Part of the Plaintiff comes from a disinterested Witness) (*g*), the former Rule will not apply; and the Evidence of a single Witness, so strengthened and confirmed, will enable the Court to decree against the Answer (*h*). There are Cases where the Court has made a Decree on the Testimony of a single

(*a*) 4 T. R. 432.

(*b*) Peake N. P. 77.

(*c*) 2 Starkie N. P. 239.

(*d*) 4 T. R. 759. 2 Esp. N. P. 695. 2 Campb. 10. 578.

(*e*) By Buller, J. 4 T. R. 759. 1 Phill. Evid. 140.

(*f*) 2 Ch. Ca. 8. 1 Vern. 161. 3 Atk. 270. 649. 1 Bro.

C. C. 52. 2 Ves. j. 243. 18

Ves. 12. 338. 2 Madd. Rep. 217.

(*g*) 9 Ves. 283. 1 Phill. Evid. 151.

(*h*) 2 Atk. 19. 140. 6 Ves. 184. 12 Ves. 80. 2 Sch. and Lefr. 521. 532. 1 Swanst. 172. 2 Fonbl. 475.

Witness, not positively and expressly contradicted by the Answer (a); but if the Defendant require it, the Court will direct an Issue, and that the Defendant be examined (b); or that the Defendant's Answer be read, so that he might have the Benefit of his Oath at Law, if it would have any Weight with the Jury (c). Where, however, the Plaintiff examines only one Witness to establish a Fact denied by the Answer, the Court will lay Stress upon the Evidence, so far as it serves to explain any *collateral Circumstance* (d); but it should seem that Circumstances, forming Pieces of Evidence, which taken separately, are not conclusive, cannot become so, by being united (e). In like Manner, the Ecclesiastical Courts require two Witnesses for the Proof of a Fact; but in a Suit there, if a Matter cognizable at Common Law, arises incidentally, as the Revocation of a Will, or Payment of a Legacy, or Plene Administravit, &c., the Proof ought to be according to the Principles and Course of the Common Law; and if they disallow a Plea, because only proved by a single Witness, they may be controuled by Prohibition (f). To pursue this intricate and extensive Subject, would greatly exceed the Province of an Annotator; for further Information, the Solicitor is referred to those Authors to whom the Profession is so much indebted for their Learning and Researches.

The Cause being set down, and the Subpoena to hear Judgment served, to prepare for the Hearing, the Pleadings and Depositions must be abbreviated, and a correct and succinct Statement prepared, explaining the Origin and Foundation of the Suit, the Situation of the Parties,

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| (a) 3 Atk. 650. 1 Ves. 66. | (d) 3 Atk. 270. 2 Madd. |
| 97. 3 Ves. and Bea. 59. 2 | Ch. 444. |
| Ves. j. 244. 9 Ves. 282. | (e) 1 Ridg. P. C. 210. |
| (b) 9 Ves. 284. 1 Bro. | (f) 2 Lev. 64. Carth. 142. |
| C. C. 52. | 1 Ld. Raym. 221. Cowp. 424. |
| (c) 3 Atk. 408. 1 Ves. 42. | Com. Dig. tit. Prohib. f. 13. |
| 2 Vern. 551. | G. 23. |

and the Relation they stand in to each other ; their Interest, immediate or remote ; the Nature of the Subject-Matter in dispute, with all its Bearings and Dependencies : the Case made should be so framed as to embrace every Point which may be raised in the Cause, and Brief Copies of the whole must be made, and delivered to the Opening and Leading Counsel, with Fees commensurate with the Length of the Brief, and the Importance of the Subject. In Cases of Intricacy and Difficulty, great Assistance and Instruction may be derived, and the Cause would be more completely understood, from a *Consultation* of Counsel, which the Solicitor, after the Delivery of his Briefs, may obtain by arranging with the Senior and other Counsel, a convenient Time for that Purpose : the Appointment is made by the Senior Counsel ; and when the Time is fixed for the Consultation, which is always held at the Chambers of the Senior Counsel in the Cause : the Solicitor must inform the Junior and other Counsel of the Time appointed, and the Solicitor must attend the Consultation, with all the requisite Papers and Proceedings in the Cause. The usual Consultation Fee is two Guineas to each Counsel, and a Fee of 7s. 6d. to the Senior Counsel's Clerk at Chambers.

Where the Proceedings run to the inordinate Length of 300 or 400 Brief-Sheets, and the suit is multifarious, and involves many difficult and intricate Questions, a judicious and well-digested Summary of all the material Facts, the Dates of Events, and other relevant Matter, stripped of the *formulae* of the Pleadings, forms a very useful Appendix as a *Dagger-Brief* ; but as Counsel frequently place too much Confidence in these Briefs, the Omission of any material Fact, might induce infinite Mischief and Trouble, and not being allowed in Costs, they are not in general Use.*

* In *Lopez v. De Tastet*, the Original Brief of 287 Sheets, by the great Skill and Judgment of the Solicitor, was reduced to a *Dagger-Brief* of 37. *Mr. Lowe's Observation on Costs, &c.*

Previous to the Hearing, the Solicitor should examine the Office-Copies of the Pleadings and Depositions, to see if they have been signed by the proper Officers in whose respective Departments they were made; an Office-Copy of any Pleading not signed could not be read in Court if objected to, and the Cause would be ordered to stand over upon payment of 5*l.* the Costs of the Day in Court; which, by the Standing Orders, the Solicitor would be directed to pay to the other side (*a*): so, if by Neglect of the *Plaintiff's* Clerk in Court, the Defendant's Office Copy of the Bill has not been amended, where the Order to amend has so directed, the Cause, if brought on, will not be heard (*b*); all the interlocutory Orders should be examined, to see that they have been passed and entered, and they should be in readiness to produce if required, a Cross Bill and Answer, or the Depositions in a Cross Cause (*c*), or in another Cause between the same Parties, without the Order cannot be read in Evidence; of which the Defendant may avail himself by taking an Office-Copy, unless restrained by the Order (*d*). So, to read Depositions taken *de bene esse*, and to prove Deeds or other Documentary Evidence *vivâ voce* at the Hearing, the Order must be produced with the Deed, &c. described in the Order and the attesting Witness; if a Bill is to be taken *pro confesso*, the Order, and where there is only one Defendant, the Record also of the Bill, and the Clerk in Court, should have Notice personally to attend therewith: in Suits by Executors, or Administrators, though the Probate may be taken out at any Time before the Cause comes on, it must be in readiness to produce, and entered, as read at the Hearing. If the Cause should be ordered to stand over for the Purpose of obtaining a Probate or Administration, it would in strictness be upon payment of Costs of the Day and if an

(*a*) Ord. Canc. Be. Ed. 186.
289. 1 Cox. 437.

(*b*) 2 Cox. 431.

VOL. I.

(*c*) 2 Ves. 579. 2 Atk. 502.

(*d*) Ord. Canc. Be. Ed.
194.

original Will is to be produced at the Hearing, a Search must be made at the Prerogative or other Diocesan Office, where the Will was proved and deposited, and Instructions given for a Messenger to attend with it at the Hearing; a Cause not in the Paper for hearing, has been called on for the Purpose of proving a Will, by production to the Register, where the Officer from York was in Attendance at a heavy Expense with the original Will for that Purpose (*a*). In some Cases the Court, upon Motion and Notice, will make an Order upon the Register of the Ecclesiastical Court to deliver out the original Will for the Purpose of being produced at the Hearing, upon giving Security, to be settled by one of the Masters, to return it safe and undefaced (*b*); or the proper Officer at the Prerogative Office will prepare the Security, and with much Convenience to the Solicitor: but if any Stress be laid upon the Hand Writing, it cannot be made use of, if only the Probate is in Evidence (*c*). Where the Register of the Chapter Court of Southwell refused a Search and Inspection of a Will there deposited, special Damages were recovered in an Action at Law, against him as an Officer of that Court (*d*). If the original Will be admitted by the Defendant's Answer to be in his Possession, an Order upon Notice by Motion must be made, grounded on the Admission in the Answer, for Production at the Hearing (*e*): but to entitle a Legatee to recover his Legacy out of a real Estate, the Probate does not seem necessary to be produced (*f*), where there is an Original Cause and a Cross-Cause, or two distinct Causes between the same Parties, relating to the same Subject Matter, or a Supplemental Suit set down for hearing, standing at a Distance from each other in the Paper of

(*a*) 4 Madd. 271.

(*d*) Turner one, &c. v. Bee-

(*b*) 4 Bro. C. C. 476. 6 Ves.
135. 602. Ambl. 343. 4 Madd.
213.

cher, Notts. Summer Assizes,
1754. Mr. Justice Birch's MSS.

(*e*) 15 Ves. 408.

(*c*) 1 Atk. 628. 2 Stra. 961. 2
Madd. Chan. 3 Bro. C. C. 263.

(*f*) 3 Atk. 361.

Causes, and it would be desirable to bring these Causes on to be heard at the same Time, an Application must be made by Motion on Notice, or by Petition (see Notices and Petitions) for an Order to advance or adjourn the one Cause or the other, so that they may come on together; and it may be of use to extend the Order to reading the Depositions taken in one Cause at the Hearing of the other, of which the Defendant may avail himself, unless inhibited by the Order (a); but it should seem, that although the Order displaces the Cause in the Paper, and *fixes* a Time for hearing, a Subpœna to hear Judgment in each Cause must be served; the Party neglecting the Service of this Process cannot bring his Cause on to be heard unless by Consent. Lord Eldon has expressed his Disapprobation of *postponing* Causes without Leave of the Court, and that unless satisfactorily explained by Affidavit, he would strike out all Causes postponed without Leave (b).

It may not be wholly useless to remark, that to a Subpœna to hear Judgment not *regularly* indorsed, the Defendant is *not bound to appear*, nor can a Decree be drawn up; and if a Decree be taken thereon by Default, it would be discharged with Costs for Irregularity (c); but it should seem that the Defendant must avail himself of the Irregularity in the *first Instance*, where the Party's Name had been *wrong spelt* in the Writ, and the Subpœna had been *irregularly* served; and with a full Knowledge of all these Errors, the Plaintiff was suffered to take a Decree; Lord Eldon, upon an appealed Motion to discharge the Decree for Irregularity, held, that the Objection should have been made upon the Hearing, and that it was too late in 1822 to raise an Objection to a Decree made in 1820, and dismissed the Application with Costs (d). Before we quit this Head, it may be proper to observe, that if the Solicitor for

(a) Ord. Canc. Be. Ed. 196.

(d) Carrick v. Grant, 20th

(b) 25th Nov. 1823. Anon. May, 1822, MSS.

(c) 1 Ja. and Wal. 292.

the Plaintiff *undertakes*, though voluntarily, to appear at the Hearing, and afterwards refuses to appear, the Court will order the Solicitor to pay the Costs *occasioned* by his Default, and also the Costs of applying for them, and not the liquidated Costs of £3 6s. 8d., the Costs of the Day at the Rolls (*a*); so, where the Defendant sets down the Cause, and the Solicitor for the Plaintiff dispenses with the Subpœna to hear Judgment, by *undertaking* to appear at the Hearing, and makes Default; the Bill cannot be dismissed in the Absence of an Affidavit of Service of Process: the Court can only direct the Cause to be struck out of the Paper; in some Cases it may be dismissed with Costs (*b*); but the Solicitor would be visited with the *whole* of the Costs occasioned by his Default of appearing (*c*). It remains to add that the Solicitor for the Party setting down the Cause must be prepared with a Copy Brief-wise of the Title of the Cause and Prayer of the Bill, to deliver to the Register when the Cause is called on in Court, or at the Rolls; the Vice Chancellor has expressed an Intention to adjourn a Cause, and to make the Solicitor pay the Costs of the Day, if Copies were not regularly delivered (*d*).

The Situation of the Cause in *Court* or at the *Rolls*, may be known by searching the General Book of Causes, at the Register Office in Chancery Lane, which is open to the Inspection of Solicitors and Parties in Office-Hours; and in delivering the Briefs to Counsel, the Solicitor would act prudently in not delivering them till the Cause is in the Paper for hearing, or within a Day or two: it frequently happens by prematurely delivering the Briefs, refreshing Fees to a great Amount have been incurred, which by common Attention might have been saved.

The Standing Orders direct a Note of all Causes, Pleas, &c. set down for hearing, to be set up by the Registers

(*a*) 16 Ves. 163.

(*b*) 17 Ves. 130.

(*c*) 5 Madd. 21.

(*d*) Grimstead v. Grimstead.
Hil. Vacation, 1819. MSS.

in their Office, two Days before any Cause, Plea, &c. is appointed to be heard (a). A Paper of twelve Causes is always made out by the Registers from their General Book of Causes in Court, and at the Rolls, taken in Rotation as they stand, a Copy of which is put up in the Register Office and Six Clerks' Office, the Day previous to the Hearing.

The Paper of Causes is called over by the Register in Court, and when a Cause comes on in its turn for hearing, the Pleadings are opened by the junior Counsel on each side; and in this Stage of the Suit, an Objection, if any, for want of Parties, ought in strictness to be made before the Merits are gone into (b). After the Pleadings are opened, the Plaintiff's leading Counsel states the Case, and argues the Matters in issue, and the Points arising thereout; the Depositions, and other Proof, and such Parts of the Defendant's Answer which admit and support the Plaintiff's Case, are read from the Office Copies by one of the Attendant Six Clerks in Term Time, at Westminster Hall; and by the Solicitor after Term, in Lincoln's Inn Hall, or in the Vice Chancellor's Court, or at the Rolls; after all the Plaintiff's Counsel have been heard in succession, the Defendant's Counsel are next heard in like manner, except that no Part of the Defendant's Answer can be read, if a Replication has been filed in the Cause: the leading Counsel for the Plaintiff replies, and makes his Observations on the whole Case, which concludes the Argument: when all the Counsel have been heard, the Court pronounces the Decree, *Minutes* of which are taken down in Writing by the Register, which the Rules and Orders direct to be read openly in Court (c). It may not be improper in this Place to remark, that if a Cause is set down upon Bill and Answer, by the Course of Practice, after the Bill has been

(a) Ord. Cano. Be. Ed. 254. (c) Ord. Canc. Be. Ed. 270. 334. 337.

(b) 3 Atk. 110.

opened, the *Answer is to be wholly read*, and admitted to be true in all Points, and *no other Evidence* allowed, unless it be Matter referred to by the Answer, and proveable by the Record (*a*). It is, however, laid down in a Book of Authority, that Deeds are allowed to be proved *vivâ voce*, at the Hearing upon Bill and Answer (*b*).

If, upon the Cause coming on to be heard, the Defendant appears, and the Cause going off to a further Day, the Defendant then makes Default, an absolute Decree may be made against him (*c*); but if the *Defendant does not appear*, the Office-Copy of the Affidavit of Service of the Subpœna to hear Judgment must be read; or if the Defendant set down the Cause, an Affidavit of the Plaintiff, that he had been served with a Subpœna to hear Judgment by the Defendant: the Court, upon hearing the Affidavit of Service, and a Sentence or two read out of the Office-Copy of the Defendant's Answer, will direct the Plaintiff to take such a Decree *nisi* as he can abide by; but the Evidence, if any has been taken, must not be entered as read (*d*); and where it is apprehended the Defendant will not appear, it would be advisable to prepare Minutes of the Decree, for it should be remarked, that a Decree *ex parte* is taken at the *Peril of the Party obtaining it*; if he cannot support it by the Pleadings and Proofs, it is not the Judgment of the Court, but the Act of the Party, conceiving what the Judgment of the Court would be if the other Party had appeared (*e*): an Objection by Defendant, for want of Parties has been allowed on shewing Cause (*f*), and a Decree made by Default, upon Service of a Subpœna not indorsed to hear Judgment, has been discharged on Motion, for Irregularity (*g*): where a Decree *nisi* was obtained by

(*a*) Ord. Canc. Be. Ed. 29.
180.

(*b*) Prac. Reg. Wy. Ed.
219.

(*c*) Dick. 93. Mos. 186.

(*d*) 10 Ves. 30.

(*e*) 2 Scho. and Lefr.

(*f*) Dick. 92.

(*g*) 1 Ja. and Wa. 292.

Surprise, the Defendant was allowed to shew Cause against the Decree before the Costs of Default were paid, and the whole Costs reserved till the Time of shewing Cause (*a*). In a Decree by Default, a Day must in all Cases be given to the Defendant, to shew Cause against it, upon payment of Costs (*b*). To make a Decree *nisi* effective, the Counsel's Brief must be left, and the Office-Copy of the Affidavit of Service of Subpœna produced to the Register with the Minutes, and Instructions given to draw up the Decree, which must be passed and entered at the Register-Office, and a Subpœna to shew Cause against the Decree obtained and served upon the Defaulter; for this Purpose a Præcipe, in the following Form, must be left at the Subpœna-Office, in the Rolls' Yard, and the Decree produced.

Subpœna for Stephen Lawrence to appear in Chancery, the 30th of January, to shew Cause against a Decree dated the 24th of January, 1823, at the Suit of John Lawrence, and others.

Kensit, Solicitor, 25th January, 1823.

This Subpœna is a judicial Process, and must be made returnable on a Day certain in Term: there appears to be no fixed Time, neither for the Service, nor the Notice which Defendant is to have between the Time of Service, and the Day to shew Cause; but there should be sufficient Time given, and the Subpœna must be served in the same manner as a Subpœna to appear and answer, for which Instructions will be found in a former Part of this Work (*c*). If the Defendant submits to the Decree *nisi*, or takes no Proceedings to shew Cause against it: to make the Decree absolute, an Affidavit of the Service of the Subpœna must be made and filed, and an Office-Copy taken; and the Decree left with the Register, for his Certificate thereon in

(*a*) Dick. 21.

(*c*) Ant. pa. 105. Dick.

(*b*) Ord. Canc. Be. Ed. 197. 596. Gilb. For. 160.

Writing, of no Cause being shewn down to the Day on which the Plaintiff should give Instructions to Counsel to move on the Affidavit and Certificate, to make the Decree absolute, which the Court will direct, as of course: the Order must be drawn up, passed, and entered, at the Register-Office and served upon the adverse Clerk in Court: to shew Cause against the Decree, it must in strictness be made absolute before a Petition for re-hearing can be presented (*a*). The Defendant's Solicitor, upon Service of the Subpœna to shew Cause, must not apply by Motion to discharge the Order absolute (*b*), but by Petition (see Title Petition) to the Judge before whom the Cause was set down, praying that upon payment of Costs of the Petitioner's Default in not attending the Hearing, the Cause may be re-heard and which will be ordered as of course: the Order must be drawn up, passed, and entered, and served upon the adverse Clerk in Court, the Costs of Default must be called for, and upon Taxation be paid or tendered to the adverse Clerk in Court, and a Certificate or Receipt taken; or if refused, an Affidavit of the Tender and Refusal made and filed (*c*). And the Order for re-hearing the Cause, with the Certificate or Receipt, or an Affidavit of the Tender, produced to the Register, and the Cause will be set down to be heard next after the Causes then appointed to be heard. ' But it should seem that a Defendant upon Service of a Subpœna to shew Cause against a Decree by Default, has been allowed upon payment of the taxed Costs of his Default in not attending the Hearing, and also of the Application, to set down the Cause to be heard on a *particular Day*, and not after the Causes already set down, of which Lord Eldon expressed his Disapprobation, as productive of Delay and Injustice (*d*), and an Order to re-hear upon Terms seems to have been made, though the Defendant had twice made Default, and

(*a*) 2 Atk. 152.

(*b*) 3 Meri. 698.

(*c*) Ord. Canc. Be. Ed. 197.

(*d*) 1 Madd. Rep. 313.

the Decree had been made absolute (a). If the Plaintiff sets down a Cause, and does not serve a Subpœna to hear Judgment, and Defendant attends, but the Plaintiff does not proceed, the Cause will be struck out of the Paper, and no Costs given on either side; and the Plaintiff may apply by Petition to have the Cause restored to the Paper of Causes: but if the Plaintiff serves a Subpœna to hear Judgment, and the Defendant makes and files an Affidavit of Service upon him, and the Plaintiff does not appear at the Hearing, the Court, upon reading Defendant's Affidavit of Service, will dismiss the Bill with Costs: where upon an Undertaking to speed the Cause, Plaintiff set it down on Bill and Answer, but did not serve a Subpœna to hear Judgment or appear when called on for hearing, the Undertaking was held equivalent to serving a Subpœna, and the Bill was dismissed with Costs (b). So, if Plaintiff does not appear upon a *Decree nisi* (c).

To advance a Cause set down for hearing, an Application by Motion or Petition must be addressed to the Judge before whom the Cause stands for hearing; and it seems to be an established Rule of Practice, that when a Cause is set down, it is in the *Discretion of the Court*, on sufficient Allegation, to direct a Cause to be advanced; and that a Defendant has no right to object to a Cause being heard at *any Time after it has been* set down, the Plaintiff undertaking to give due Notice to the Defendant of its being so advanced: an Application to re-place the Cause has been refused (c). The approaching Death of a Party, or other Circumstances may render such an Acceleration necessary (d). Where an Annuity claimed by the Bill was all the Subsistence the Plaintiff had for herself and nine Children, it was held sufficient ground to order the Cause to be advanced, and in a Suit for specific Performance, where a Term for Years, the Subject of Dispute would expire before the Cause could

(a) Dick. 109.

(d) 1 Meri. 382.

(b) 17 Ves. 130.

(e) 2 Madd. Chan. 449.

(c) Sel. Ca. Ch. 6. 50.

1 Ves. j. 56.

be heard in its regular course, a like Order was made (*a*). A Cause set down to be heard *pro confesso* has been advanced on Motion (*b*), but not a Foreclosure Cause.

A Cause has been allowed *to stand over* to another Day, at the Instance of a Party who is not prepared to bring on the Cause, and the Court will in most Cases appoint a future Day for hearing the Cause; if no material Inconvenience can be shewn, it is not unfrequently consented to: if, however, the Application should be resisted by the adverse Party, the Court in acceding to such Request, will make the Party applying pay the Costs of the Day, which in Court is 5*l.*, and at the Rolls, 3*l.* 6*s.* 8*d.*, unless the Application be at the Request of Counsel, or the Cause be taken out of its turn, or it be the last Cause in the Paper of the Day. If the Cause is likely to come on before the Day to which the Publication has been enlarged, an Application must be made that the Cause may stand over, or be adjourned; it would otherwise be struck out, and must be set down *de novo*. The latter Course of proceeding will be found in a former Part of this Work (*c*). Where a Variance appears between an original Will and the Probate, a Cause has been directed to stand over, to apply to the Spiritual Court for Amendment (*d*); so to get a Piece of Evidence stamped (*e*): and though in strictness an Objection for want of Parties ought to be made, after the Pleadings have been opened, and before the Merits have been gone into (*f*), the Objection has been allowed, after the Cause has been in part heard; and upon hearing an Appeal, the Cause has stood over, and Leave has been given to file a Supplemental Bill, merely to add Parties (*g*); so where a Party is stated by the Bill to be out of the Jurisdiction of the Court, Proof of that Fact being necessary, but omit-

(*a*) 1 Meri. 381.

(*b*) 1 Madd. Rep. 175.

(*c*) 1 Ant. pa. 253.

(*d*) 2 Atk. 50.

(*e*) 9 Ves. 252. 11 Ves.

593-5. 2 Bro. C. C. 32.

(*f*) 3 Atk. 110.

(*g*) Dick. 799.

ted, the Cause has been allowed to stand over to examine Witnesses in Proof; for though the Court might be disposed to act upon the Admission of an Adult, it cannot if an Infant is Party (a). If in these Cases the Court allows the Cause to stand over for the Purpose of making proper Parties (b), it is usually upon payment of Costs of the Day: to entitle the Defendant to these Costs, the Court has in some Instances held, that the Defendant should have raised the Objection in his Answer (c): and where a Cause has gone off for want of Parties, the Plaintiff has been put upon Terms of amending within a given Time, or the Bill be dismissed with Costs (d). It remains to observe that after the Cause has stood over for want of mere formal Parties, an Objection which has held in the first Instance, comes too late when the Cause comes on again (e).

In Suits for the Administration of Assets, and other Matters of ordinary occurrence, a Decree is usually made as of course upon the Hearing of the Cause, and the Minutes are taken down in Writing by the Register; but in difficult and important Questions which require anxious and mature Deliberation, the Court takes Time to consider the Decree proper to be pronounced, during the Interval the Cause is said to *stand for Judgment*, and as such the Register enters it in his Book of Causes under that Head. Cases of great urgency, pressing for an early Decision, would furnish a Ground for a special Application, to effectuate which, Instructions should be given to the senior Counsel to request the Judgment of the Court, of which Notice will be signified through the Register to the respective Solicitors in the Cause: preparatory to the Cause coming on for Judgment, the former Briefs on hearing should be re-delivered to each Counsel who attended, with Notice of

(a) 4 Madd. 408. and
Heigh v. Swinney, May, 1823.
M&S.

(b) 2 Atk. 11.

(c) 2 Atk. 109. 3 Madd. 61.

(d) 1 Stra. 95. 1 P. Wms.
592.

(e) 3 Atk. 217.

the Day appointed for giving Judgment ; and the Solicitor for the Party calling for the Judgment of the Court, should in Courtesy inform the Solicitor for the adverse Party : when the Cause comes on, the Solicitor must attend in Court, with all the Papers, Proofs, and Proceedings in the Cause, as at the former Hearing, and the Register takes down in Writing *Minutes of the Judgment given* : these Minutes are of great Importance, and deserve the utmost Consideration and Attention, and in forming them, much practical Knowledge and Judgment is required. They should express in direct Terms the Judgment of the Court upon the Matters in issue ; and the Solicitor should be attentive to the Directions given by interlocutory Decrees, that they are full, and comprehend every practical Requisite for carrying into Effect the Object of the Suit : the Omission of any material Fact might subject the Parties to the Expense and Delay of a re-Hearing or Appeal, and ultimately to the more tedious and expensive Proceeding by Bill of Review. At a Consultation, it is usual in Cases of Difficulty to draw up a Statement in Writing of such special Directions, in the Shape of Minutes, as by the Assistance of Counsel it may be advisable to submit to the Court ; and it would be prudent for a junior Practiser to advise with Counsel, upon the Nature of the Relief his Client may be entitled to, as Instructions to settle the Minutes with the Register.

The Decree being pronounced, *Copies of the Minutes*, taken in Writing by the Register in Court, are usually applied for by the Solicitors for the Parties interested in the Decision. The Solicitor for the Plaintiff, or for the Party in whose Favour the Decree is made, must apply to the Register for a Copy of the Minutes, and for this Purpose he is frequently required to leave the senior Counsel's Brief on the Hearing : when the Minutes are drawn up and ready for Delivery, the Solicitor must take an Office-Copy for his Perusal and Approbation, and appoint a Time with the Register for settling the Minutes, of which the Register usually sends a

Note in Writing to the adverse Clerks in Court for those Solicitors who have taken or bespoke Copies. The Solicitor prosecuting the Decree must attend the Register to settle the Minutes: while the Decree rests in Minutes it is considered as imperfect, and liable to be altered at any Time, before it is drawn up in form, and regularly passed and entered (a); and if the Defendant die before it be drawn up, the Decree cannot be passed and entered *nunc pro tunc*; the Suit must be revived (b). Any Alteration or Variation in the Minutes, such as the Register will not take upon himself to make without the Direction of the Court, cannot be made by the Solicitor; Lord Eldon has expressed in very strong Language, his Disapprobation of an Alteration by the Solicitor for one of the Parties, after they had been drawn up and delivered out by the Register (c).

An Application must be made before they are passed, to rectify or vary the Minutes, which may be by Motion or Petition, Forms of which may be found under the respective Heads, (*Notices and Petitions*,) in a subsequent Part of this Work: if the Application be by Motion, a two-Days Notice in Writing, expressing the whole of the Alteration required, must be served upon the adverse Clerk in Court, and an Affidavit of Service made and filed, and an Office-Copy taken to read, if the other Side do not appear; and Instructions must be given to the senior Counsel with his Brief on the Hearing, and also Copies of the Minutes as drawn up, with the Alterations required, and a Copy of the Notice of Motion annexed: when the Motion comes on, the Solicitor must attend, with all the Papers and Proceedings, and the Affidavit of Service, and it will be ordered or refused, as seems expedient, with or without Costs. An important Point in the Cause, by leave of the Court, though irregular, has been allowed to be argued on a Motion to vary

(a) 7 Bro. P. C. 204.

(b) Dick. 25.

(c) *Sylvester v. Perry*, 27th June. 1822. MSS.

the Minutes (*a*). If an Order to vary the Minutes should be made, it must be drawn up, passed, entered, and served upon the adverse Clerks in Court, and an Appointment made with the Register to settle the Minutes as directed by the Order. If the Application to vary the Minutes be by Petition, which is the only Course on Decrees or Orders made by the Master of the Rolls, the material Facts and Circumstances upon which the Application is founded must be stated, praying the consequential Relief; and if the Decree was made by the Lord Chancellor or Vice Chancellor, the Petition transcribed upon half-crown Stamps, must be left at Mr. Farrer's Office, in Lincoln's Inn Fields, the Lord Chancellor's Secretary, and also a fair Copy upon unstamped Paper, (the Fee upon leaving is 10s.) and when it is answered, (which in strictness should appear by the Date to have been as soon as presented) (*b*), a Copy of the Petition, with the Order for an Attendance thereon, must be served on the adverse Clerk in Court, two clear Days before the Day appointed for hearing, as on Monday for Thursday: an Affidavit of Service should be made and filed, and an Office-Copy ready to be used if necessary. Brief Copies of the Petition must be made and delivered to Counsel, with the former Brief, and the Petition will come on in its turn in the Paper of Petitions set down for hearing. If the Cause was heard at the Rolls, the Application must be by Petition, which must be left with his Honour's Secretary, at his Office in the Rolls' Yard, and set down for hearing there; the Proceeding is in other respects similar to the Proceeding before mentioned.

It should be remarked that the Lord Chancellor will not interfere with the Minutes of an Order or Decree of the Master of the Rolls, nor the Master of the Rolls with those made by the Lord Chancellor or the Vice Chancellor: the latter has no Jurisdiction to reverse, vary, or alter Decrees or Orders of the

(*a*) 1 Ves. j. 251.

(*b*) 3 Meri. 15.

Master of the Rolls (*a*). By the Standing Orders of the Court, no Application shall be made to rectify Minutes of a Decree, after a Week from the pronouncing the Decree or Order (*b*); but this Order seems not to have been followed and the continued Practice has been otherwise (*c*): If the Application be in the same Term in which the Decree or Order was made (*d*), or the Seals after, before the Decree has been passed and entered, the Court has allowed the Application.

When the *Minutes* are finally settled, the Register will draw up the Decree. This is usually done at the Instance of the Plaintiff's Solicitor; but in case of Delay, the Solicitor for any Party in the Cause may give Instructions for that Purpose, by leaving one of the Counsel's Briefs on the Hearing, and such other Documents in the Cause as the Register may require; and from some Solicitors he will require a Deposit of Three or Four Guineas; the Solicitors for all Parties interested in the Suit usually bespeak Copies: the Decree will be delivered out by the Register to the Solicitor who bespoke it; and the Solicitor should examine it very carefully with the Pleadings and the Minutes; and an Entry in the Decree of the Documentary Evidence *as read at the Hearing* should not escape the most serious Attention of the Solicitor: an Omission in the Decree, of a material Piece of Evidence as read at the Hearing, in some future Stage of the Suit might be productive of very great Inconvenience; for it should seem, that where it does not appear by the Register's Minutes that any Evidence was read at the Hearing the Cause, the Court ought not, upon a subsequent Application, to make an Order that the Evidence should be entered as read (*e*); but in a Decree taken by Default, it is not the Practice to enter the Evidence as read, there being no Appeal from a Decree so taken (*f*). The

(*a*) 53 Geo. 3. c. 24.

(*d*) Sel. Ca. Ch. 29.

(*b*) Ord. Cano. Be. Ed. 325.

(*e*) 1 Bro. P. C. 466.

334. 337.

(*f*) 10 Ves. 30.

(*c*) 1 Ves. and Beam. 327.

Decree must be returned by the Solicitor to the Register, to be passed; for which Purpose, he will appoint a Day, and *ex gratia* send a Note in Writing to the adverse Clerk in Court, and if Office-Copies of the Decree have not been bespoke, or taken away and not paid for by the opposite Solicitor, the Register will proceed *ex parte*, but the Register will require the Solicitor drawing up the Decree, to give Notice in Writing to the Solicitors for the other Parties, (which may be in the following Form) and an Assurance that such Notice was given (*a*).

“ Mr. Vernon. Lawrence against Wilson.

“ The Register will pass this Decree on Friday

“ next, the 12th Inst. at Twelve o’Clock at

“ Noon.”

H. Kensit, Plaintiff’s Solicitor,
7th May, 1822.

The Solicitor must attend the Register’s Appointment for passing the Decree, and if any Clerical Errors have been discovered in the Copy, or any immaterial Alteration as of course should be required, they must be pointed out to the Register: the Solicitors for all Parties taking Office-Copies should attend to examine their Copies at the same Time, and to point out any Errors; but unless the Copies are paid for, their Attendance will not be allowed. The Decree is then read over and passed, by the Register affixing his Signature on the left hand of the last Sheet of the Decree: the next and last Proceeding is to *enter the Decree* thus passed in the Books of the Register Office, which is done by leaving the Decree with one of the entering Clerks at that Office; the Decree is then complete. Decrees and Orders made in Michaelmas and Hilary Terms, are to be entered before the first Day of Michaelmas Term following; and those of Easter and Trinity Terms, before the first Day of Easter Term, and if they are not entered within those Periods, an Order as of course must be obtained by

(*a*) 2 Cox. 206.

Motion or Petition to enter them *nunc pro tunc*, which must be drawn up, passed, and entered, at the Register Office, and produced to the entering Clerk with the Decree, or Order to be entered (a). It may be proper to remark, that the Decree is *inoperative*, unless it be *passed and entered*: if the Solicitor drawing up the Decree, takes it from the Register, and *neglects or refuses* to return it to him to be *passed*; an Application must be made upon notice, in Writing, for an Order upon the Solicitor to return the original Decree to the Register, to be passed and entered within a fixed Period of Time (a Week); which will be ordered as of course, with the Costs of the Application, and must be enforced, if necessary, by personal Service of the Order upon the Solicitor, and by the usual Process of Contempt, if not obeyed; or if after the Decree has been *passed*, the Solicitor should not *enter* the Decree, the Register upon a Representation of that Fact, will sign the Office-Copy, and in the Absence of the original Decree, the Office-Copy signed must be left with the entering Clerk, and an Entry of the Decree will be made from the Office-Copy thus authenticated. An Office-Copy of a Decree signed by the Register is effective for every Purpose of proceeding in the Cause, but to check the Irregularity of not entering Decrees, the Register will not sign any Office-Copy, unless the original Decree has been entered or left with the entering Clerk, for that Purpose; or, upon wilful Refusal by the Adverse Solicitor to enter the original Decree.

Decrees are *interlocutory* or *final* (b).

Where Proceedings are directed to ascertain Facts, upon which the final Decree is to be founded, as in Cases of disputed Accounts, or Questions of Title (c), or where the Court directs an Action to be brought, or an Issue to be tried, or a Case to be stated for the Opinion of a Court of

(a) Ord. Canc. Bea. Ed. 291. suspended by a subsequent Order, 293.

(b) For. Rom. 182. Ma-
rauth, 362.

(c) 6 Ves. 649.

signed and inrolled, by Bill of *Review* (a), the Vice Chancellor has stated it to be a general Rule, that Applications to rectify an Omission in a Decree, should be made by Petition, assigning as a Reason, that the Court might thereby have before it all the Proceedings in the Cause (b); but an Omission in a Decree of a Direction purely of course, the usual Direction, for instance, on a Bill by Creditors, *to take an Account of the personal Estate*, has been supplied, not by varying the Decree, but by Order, upon *special Motion* (c); so, where a Direction *to examine all Parties upon Interrogatories* had been omitted, a supplemental Order was made (d), and in addition to the Order for the Production of Books, &c., the Words, *as the Master shall direct*, have been supplied in like Manner (e): and where by Mistake, the Decree directed Money to be paid in, which had been previously invested, the Decree was varied (f); and a Misnomer in a Decree, in the Accountant-General's Account, has been by special Order and Affidavit directed to be rectified as to both (g): so a clear Mistake in a mere Matter of Figures, has been rectified (h), and an *Addition* has been made to a Decree by directing "*a Reference to the Master to take an Account of the Dividends received since the Death of the Testator by the Defendants upon the Funds directed to be transferred, with the consequential Directions, and that what shall be reported due from him, may be paid into the Bank*, by consent, upon special Motion (i); and after a Direction for Taxation of Costs, the Words, *as between Attorney and Client*, omitted by mistake, were by consent ordered to be inserted (k). And even after the *Inrolment* of a Decree,

(a) 3 P. Wms. 371. 1 Ves.

93. 4 Ves. 440.

(b) 4 Madd. 464.

(c) 7 Ves. 292.

(d) Ibid. 293.

(e) 5 Madd. 121.

(f) 12 Ves. 458.

(g) 2 Madd. Rep. 391.

(h) Prao. Reg. Wy. Ed. 155.

(i) 12 Ves. 456.

(k) 1 Swans. 573.

Errors appearing on the Face of Schedules have been allowed to be rectified, upon a special Application, without a Bill of Review ; but for such Purpose, an Affidavit introducing a new Fact, has been rejected (*a*). Where an Insolvent Court Attorney had by sharp Practice procured a Decree to be passed, without Notice to the adverse Solicitor, depriving a mere Trustee of his Costs, which he would have been entitled to as of course upon the Hearing, the Court on petition, refused to give the Costs after the Decree had been passed, though a re-Hearing as to Costs is not allowed (*b*).

As connected with this Head, it may be useful to consider the Course of proceeding where Decrees or Interlocutory Orders have been *lost*, and the Means to be taken to supply the Defect. Where the Inrolment of a Decree has been lost, the Court has directed the Cause to be re-heard (*c*) ; and the Loss of a Decree drawn up and proceeded upon, but not *entered*, after a lapse of eighty Years, has been supplied by Order, directing an Entry of the Decree to be made from a Paper Writing, purporting to be a Copy of the Decree, and to be inrolled *nunc pro tunc* (*d*) : so, where an original Decree, which had been acted upon, and several Reports made under it, could not be found, and an Order had been made on further Directions *reciting* the Decree, the *Recital* was held sufficient Authority for the Court to make an Order, directing the Decree to be drawn up and passed from an Office-Copy, and to be entered *nunc pro tunc* (*e*). And in a recent Instance, the loss of a Decree pronounced above twenty-three Years, drawn up and not *entered*, was supplied by an Order made upon a summary Application, directing the Decree to be drawn up according to the Minutes in the Register Book, and entered *nunc pro tunc* (*f*).

To enter very fully into the Consideration of the Persons and the Interests immediately or remotely affected by a

(*a*) Coop. 134.

(*b*) 2 Cox. 206.

(*c*) 3 Ch. Rep. 27.

(*d*) Dick. 370.

(*e*) 11 Ves. 601.

(*f*) 1 Ja. and Wa. 24.

Decree, would greatly exceed the Province of an Annotator; for the Purposes of this Work it may be sufficient briefly to observe, That all original Parties to a Suit, or those made Parties thereto, or to the Decree, and such as claim under them *pendente lite*, are bound by the Decree (*a*): Purchasers *pendente lite* are bound (*b*); in a Suit between Lords and Tenants of a Manor, to establish a Custom, all the Tenants will be bound by the Decree, though not Parties to the Bill (*c*): the Mortgagees of an Equity of Redemption, made such pending the Suit, are bound by a Decree of Foreclosure, though not Parties to the Suit (*d*); where one, *not Party*, having Notice of a Decree, paid Money contrary to it, though to the Hand legally empowered to receive it, he was held bound; and by another Suit, was compelled to repay it (*e*). An *Infant* is bound by a Decree in a Cause where he is Plaintiff, as much as a Person of full age (*f*); in a Decree against an Infant Defendant, a Day (usually Six Months) after he comes of age, is given him, being served with Process, to shew Cause why it should not be made absolute: the Process is a Subpoena to shew Cause, which being a judicial Writ, must be returnable in Term Time, and the Decree is made absolute, without entering an Appearance (*g*); but an Infant Defendant, upon coming of age, and before the *Decree nisi* is made absolute, may put in another Answer, the Answer of his Guardian not binding him (*h*), and may make a Defence, and examine Witnesses (*i*); and a new Answer put in by the Infant, has been held to be sufficient Cause shewn against the Decree being made absolute (*k*); but an Infant aggrieved by a

(*a*) 1 Ch. Ca. 152. 2 Vern.
112.

(*b*) 3 Ch. Rep. 22. 48. 2
Freem. 127.

(*c*) 1 Eq. Ca. Abr. 163.

(*d*) 11 Ves. 194.

(*e*) 1 Vern. 57.

(*f*) 3 Atk. 626.

(*g*) 1 Ves. 183. 1 Ball and

Bea. 651. 4 Bro. P. C. 340.

(*h*) 1 P. Wms. 503.

(*i*) 2 P. Wms. 401. 2 Atk.
531.

(*k*) Mose. 313.

Decree, is not obliged to wait his coming of age, to seek Relief; he may apply for that Purpose as soon as he thinks fit; nor is he bound to proceed by re-hearing the Cause, or by Bill of Review; he may by an original Bill impeach the *Decree nisi*, charging Fraud and Collusion, or that no Day was given him to shew Cause (*a*): and the Infant having Merits on his Side, may before he comes of age, apply for Leave to put in a better Answer; but in a Decree of Foreclosure, though the Infant has a Day to shew Cause when he comes of age, he is not allowed to go into the Account, nor to redeem the Mortgage, but only to shew Error in the Decree (*b*): an *Infant Plaintiff* is (unless under extraordinary Circumstances) (*c*) as much bound, and as little privileged as an Adult (*d*); but the Court will take care that the Infant does not make any injurious Submissions by his Bill, and if necessary, allow him at the Hearing to amend his Bill, on payment of Costs of the Day (*e*): and an Infant has been allowed to shew Cause when he comes of age against a Decree in his own Cause respecting *real Estate* (*f*); but an Infant is as much bound by a Decree respecting *personal Estate*, as a Person of full age (*g*); though an Infant cannot be foreclosed without a Day to shew Cause, yet where Lands are devised to Trustees for sale, to pay Debts, and the Heir at Law is an Infant, he has no Day given him to shew Cause, upon coming of age (*h*); but it seems to be otherwise, if there is no Devise to any particular Person (*i*). Co-Defendants are not bound as to their Right, with respect to each other, unless called upon to

(*a*) 1 P. Wms. 736. 2 Sch. and Lefr. 292. 2 Atk. 528. 531. (*f*) 2 P. Wms. 401. 3 Atk. 627.

(*b*) 3 P. Wms. 352. (*g*) 3 Atk. 626.

(*c*) 2 Atk. 530. 184. (*h*) 2 Vern. 429. Pre. Ch.

(*d*) 2 P. Wms. 519. 3 Atk. 626. 2 Freem. 127. (*i*) 1 Atk. 421. 3 Atk. 119. 1 Vern. 295.

(*e*) 2 P. Wms. 387.

contend upon them (*a*). The noble and learned Author we so often referred to, has decided that a Court of Equity has the Jurisdiction, and that it has constantly exercised the Practice, to make Decrees between co-Defendants, grounded on Evidence arising out of the Pleadings and Proofs between Plaintiffs and Defendants (*b*): that the Defendant chargeable has a Right to insist, that he shall not be liable to be made Defendant in another Suit for the same Matter that may then be decided between him and his co-Defendant, and the co-Defendant may contend that he shall not be obliged to institute another Suit for a Matter that may be then adjusted between the Defendants (*c*); and the Court, from whence there is no Appeal, has declared, that a Refusal of a Court of Equity so to decree, would of itself furnish a good Ground of Appeal from either Defendant (*d*).

It remains to consider the Persons who may avail themselves of the Benefit of a Decree. An Author of great practical Experience has stated, that after a Decree, *all Parties* to the Suit, who are *interested*, may take Steps to have the Benefit of it (*e*); that a Plaintiff coming in under a Decree in a Cause, in which he is no Party, to prove a Debt for which he has filed his Bill, where the Plaintiff in the former Cause delays prosecuting, has been allowed to prosecute the Decree in the Name of the Plaintiffs in the former Suit (*f*); and where a Plaintiff has been entitled to Relief against two Defendants, and one ought to indemnify the other, after a Decree to pay the Plaintiff, one Defendant has been allowed to prosecute the Decree against the other Defendant (*g*): and one Defendant may enforce a Decree, confirming a Report in his favour (*h*). Any Creditor may obtain an Order for prosecuting a Decree for an Account (*i*)

(*a*) 8 Ves. 123.

(*b*) 5 Sch. and Lefr. 710.

(*c*) 2 Ball and Beat. 255.
2 Sch. and Lefr. 718.

(*d*) 3 Dow. 153. Dom. Proc.

(*e*) Dick. 280.

(*f*) Dick. 235, 797.

(*g*) 2 Ves. 622.

(*h*) 1 Ball. and Bea. 217.

(*i*) 2 Ves. j. 165.

and in case of unreasonable Delay in prosecuting a Decree, in a Suit against an Administratrix, Leave has been given to a Creditor to prosecute the Decree (*a*); and where, three Years after a Decree in a Creditor's Suit, no Proceedings were taken to examine the Defendant, a Creditor restrained by Injunction from proceeding at Law, has obtained Leave on Motion to prosecute (*b*); and if a Creditor who is interested in part only of the Matter in question has come in under the Decree, he has been allowed to carry on the Suit, where the Plaintiff has been guilty of great Delay (*c*).

When the Decree has been entered, a *Copy of the Title and ordering Part* should be left with the Master, to whom by the Decree the Cause is referred. The Enquiries directed, differ in almost every Decree; it is impossible therefore, to meet every Case which may arise, or to furnish any particular Sett of Rules or Instructions for the Solicitor's Guide. A perfect Knowledge of these Proceedings can only be obtained by a very extensive Practice. We shall, therefore, in this Instance, confine ourselves to the Directions generally contained in Decrees for the Administration of Assets and the Distribution of Property under Wills; and give such Instructions to the young Practiser as will enable him, in addition to his own Observation and Experience, to conduct a Cause through the Master's Office similar in its Direction to that of which the Bill of Costs is here given.

EASTER TERM, 1821.

A Copy of the ordering Part being taken to the Master's Office, the Clerk will examine it with the Decree. The usual *Advertisement for Creditors* may be then bespoke, of the Master's Clerk, which will be delivered to the Solicitor immediately after it has been signed by the Master; it

(*a*) 3 Meri. 458.

(*c*) 5 Madd. 31.

(*b*) 2 Madd. 183.

must then be left with the Printer of the Gazette for Insertion. It is now generally required that Advertisements should likewise be inserted in some of the Public Newspapers, and in some of the Country Papers where Testator resided; a Measure in which the public Convenience is peculiarly interested, and for which there is an Office in London, where Advertisements for any of the Country Papers are taken in, and regularly inserted.

The Decree after the usual Directions for taking an Account of the Personal Estate, &c. in case of a Deficiency of the personal Estate for payment of Debts and Funeral Expences, directs an Enquiry, whether the Testator was at the Time of his Death a *Trader, within the Intent and Meaning of the Statutes relating to Bankrupts*; and if found to be such Trader, then directs the Master to enquire what real Estate the Testator died seised or possessed of. Or, if it be admitted at the Hearing, that the Testator, at the Time of his Death, carried on a Trade or Business, a Decree declaratory of the Testator being admitted to be a Trader within the Meaning of the Act of Parliament, passed in the forty-seventh Year of his late Majesty, intituled “an Act for the more effectually securing Payment “ of the Debts of Traders:” and of the real Estate being liable to make good the Deficiency of the personal Estate in the Course prescribed by the Act of Parliament, is pronounced; and the necessary Directions for a Sale of the Testator’s real Estate, and the Application of the Money arising therefrom in aid of the personal Estate are given accordingly; but a Person who had been in Trade, and ceased to be so at his Death, has been decided not to be a Trader within the Act (*a*), nor are Copyhold Estates (*b*).

To proceed on the Enquiry directed to be made by the Master, *Interrogatories* must be left for the Examination of the Defendants the Executors, as to their Receipts and

(*a*) 3 Meri. 436.

(*b*) 1 Madd. Ch. 588. 47 G. 3. s. 2. c. 74.

Payments on Account of their Testator's Estate, and any other Facts and Circumstances respecting which an Enquiry is directed by the Decree, and which must necessarily be within their Knowledge. As the Interrogatories for the Discovery or Statement of any special Matter must ever be framed according to the Circumstances of the Case, or Transaction to be enquired into, we have in the following Precedent confined ourselves to the standing Interrogatories usually filed against Executors, under the Directions contained in a Decree for passing an Executorship Account. At the same Time it must be remembered, that any Defendants in the Cause may be examined on Interrogatories, to prove Facts or Circumstances within their Knowledge; and Witnesses may also be examined on Interrogatories to Facts or Circumstances arising out of the Cause. But as the Form of Examination differs, an Explanation of this Difference will be given hereafter.

For the Examination of an Executor under a Decree for administering the Assets, the Court has directed that the Interrogatories, brought into the Master's Office, should contain an Interrogatory to the following Purport, viz. *Whether the Defendant, the Executor, was indebted to the Testator upon any and what Account?* And where an Interrogatory to that Effect has been omitted, the Court upon the mere Suggestion of a co-Defendant, after the Examination has come in, has given Leave, as of course, to exhibit an Interrogatory, to be settled by the Master, for that Purpose, but not to go into an Account, which must be the Subject of a Bill: an Application in so late a Stage of the Proceedings, and which ought to have been made earlier, might subject the Party applying, to the Payment of Costs (a). The Decree authorizes the Master to examine Parties as he should see fit, and he settles the Interrogatories for the Examination of Parties, but not for the Examination of Witnesses (b): and it seems to have been set-

(a) 13 Ves. 262. 19 Ves. 593.

(b) 19 Ves. 593.

tled by *Lord Hardwicke*, that where there is a general Direction in a Decree to examine on Interrogatories before the Master, as the Master shall direct, if the Party has been examined on one Sett, and afterwards there should arise another Matter, which the Master thinks proper to be examined into, it is in the Judgment of the Master, at what Time, and how often he thinks fit that the Defendant should be examined ; that a new Order is not necessary, as in the Case of a Witness (a). And where there is a Slip in the Interrogatories for the Examination of a Party, as at first exhibited, the Master is at liberty, without any Application to the Court, to admit additional Interrogatories (b): but a Master cannot, without an Order, examine a Party, who has been examined in chief, and cross-examined ; which is not of course, but in the Discretion of the Court, upon special Application, and the Examination is restrained to such of the Points in the Cause, to which the Party has not been examined, as the Master thinks reasonable to be examined to, and the Order directs the Master to settle the Interrogatories (c). The Deposition of a Witness examined *previous* to the Decree, and re-examined to different Matters before the Master, *without an Order*, was suppressed with Costs ; but upon special Notice, Leave was given for his re-examination to Matters not previously examined to, upon Interrogatories *to be settled* by the Master (d).

The Master must receive Interrogatories from both Parties, though one of them should not have gone into any Proof in the former Stage of the Cause (e). And under the usual Directions for the Master to examine all Parties on *Interrogatories and otherwise*, where there have been

(a) Dick. 149. 2 Ves. 270.	(d) 1 Ves. j. 398. 3 Ves.
11 Ves. 464. 1 Coop. Ch.	603. 1 Cox. 312. 11 Ves.
Rep. 291.	564. 13 Ves. 320. 2 Sch:

(b) 3 Madd. 284. 19 Ves.	and Lefr. 218.
116. Prac. Reg. Wy. Ed. 256.	(e) 3 Br. C. C. 190.

(c) 17 Ves. 434. Dick. 508.
1 Bro. C. C. 388.

very strong Contradictions in the Examination, it has been decided that the Master is at Liberty to examine the Parties *vivâ voce*, without further Order, although he has previously examined them upon Interrogatories (a). And if the Master should decline to examine any Party, when required so to do, and should make his Report without such Examination, it should seem, that in Point of Form, a Party cannot make that the Subject of an Exception to the Report: he should, upon the Refusal, in an early Stage of the Proceeding, have applied by Motion grounded upon the Circumstances of the Case, that the Master should be specially directed to examine that Party: on a Reference in Bankruptcy, upon an Application under similar Circumstances, the Lord Chancellor directed the Master to state the Grounds on which he declined to examine the Party (b). It is laid down in the Books of Practice, that the Master may examine Witnesses, and that he did so, and that it was formerly the Course of the Court for the Master to examine upon Matters depending in his Office; and that if he thinks fit, he may do so now, after a Decree, but ought not to do so by his Clerk (c): but the Master rarely exercises this Authority. In *Lucas v. Temple*, the Master to whom the Cause was referred, took upon himself the Examination of the Witnesses, the only modern Instance of such a Proceeding, for a considerable length of Time; and as it is clearly settled, that the Master cannot examine Witnesses by his Clerk, the Course of Practice is to file the Interrogatories settled and allowed by the Master, at the Examiner's Office, in the Rolls Yard, for the Examination of Witnesses residing in Town, or to issue a Commission for the Examination of such who reside in the Country, above twenty Miles from Town, and to use the Office-Copy of

(a) 2 Cox. Rep. 196.

(b) 2 Cox Rep. 168.

(c) 3 Ves. 603, 607. Ord.
Canc. Bea. ed. 218, 285. et
notis.

their Depositions in proceeding upon the Enquiries before the Master; but after an Examination has been concluded and made known, by a Warrant from the Master to publish the Depositions, a further Examination is not permitted, unless by special Order (a).

An Order, by one Defendant, to examine another Defendant, is not of course after a Decree, as it is before: a special Ground must be laid (b).

The following Forms of Interrogatories will be found very useful and instructive Precedents.

Form of Interrogatories relating to the *personal* Estate and Effects.

In Chancery.

Between John Lawrence and others, Plaintiffs,
and

George Wilson, and others, Defendants.

Interrogatories exhibited on the Part of the Complainants before Francis Paul Stratford, Esq. one of the Masters of this Court, to whom this Cause stands referred, for the Examination of the Defendants, *George Wilson and William Johnson*, pursuant to the Decree made on the Hearing of this Cause, bearing Date the 11th Day of March, 1822.

First Interrogatory. Whether or not was *Stephen Lawrence*, deceased, the Testator in the Pleadings named at the Time of his Death, possessed of, or entitled to, or interested in any and what Goods, Chattels, personal Estate and Effects, *not specifically bequeathed by his Will, and over and above what you have already given an Account of, in and by the Answer put in by you in this Cause* (c) as you know, or for any and what Reason believe. If Yea, set forth a full, true, and just Inventory and Account of all such personal

(a) 19 Ves. 590.

(b) 16 Ves. 218.

(c) This must be altered or omitted, as the Case may be.

Estate and Effects, and of every Part thereof. And of all the Particulars whereof the same consisted, and the Quantity, Qualities, and the full and true Values of all such Particulars, according to the best of your Knowledge, Remembrance, and Belief.

Second Interrogatory. Whether or no have you or any and what Person or Persons, by your Order, or for your Use, possessed or received all or any, and what Part of the personal Estate and Effects of the said Testator, *over and above what you have already given an Account of, in and by the Answer put in by you in this Cause?* If Yea, set forth a full, true, and particular Account of all such personal Estate and Effects, distinguishing the several Particulars thereof, together with the Names of the Person or Persons by whom the same and every Part thereof were or was possessed and received, and all the Particulars relating thereto.

Third Interrogatory. Have or hath you or any and what Person or Persons, by your Order, or with your Privity or Consent, paid or applied or disposed of, all or any and what Parts or Part of the personal Estate and Effects of the said Testator in and by the preceding Interrogatories mentioned and enquired after, *over and above what you have already given an Account of in and by the Answer put in by you in this Cause?* If Yea, set forth a full, true, and particular Account of all such personal Estate and Effects, so paid or disposed of, distinguishing in such Account the Times when, and the Names of the Persons by and to whom, and for what the same and every Part thereof have or hath been so paid, applied, or disposed of, and all the Particulars relating thereto, fully and at large, according to the best of your Knowledge, Remembrance, and Belief.

Form of Interrogatories as to the *real Estate*.

In Chancery.

Between John Lawrence and others, Plaintiffs,
and

George Wilson, and others, Defendants.

Interrogatories exhibited on the Part of the Complainants, before Francis Paul Stratford, Esq. one of the Masters of this Court, to whom this Cause stands referred, for the Examination of the Defendants, *George Wilson and William Johnson*, pursuant to the Decree made on the Hearing of this Cause, bearing Date, the 11th Day of March, 1822.

First Interrogatory. Whether or no was the Testator, *Stephen Lawrence*, in the Pleadings named, at the Time of his Death, seised or possessed of, or entitled to, or interested in any and what *Freehold, Copyhold, or Leasehold Estates, held for Lives or Years* not specifically bequeathed by his Will, and over and above what you have already given an Account of in and by the Answer put in by you in this Cause, as you know, or for any and what Reason you believe? If Yea, set forth a true and just Rental and Account of all such Estates, respectively distinguishing such Parts as are Freehold, and such Parts as are Copyhold or Leasehold, and where the same are respectively situate, and in whose Tenure or Occupation the same respectively are, and of what Manor or Manors such as are Copyhold are holden, together with the Names of the Person or Persons of whom the same are so held, according, &c. as before.

Second Interrogatory. Whether or no have you or any and what Person or Persons by your Order, or for your Use, possessed or received any and what Sum or Sums of Money, for or on Account of the Rents, Profits, or Produce of the Estates of the said Testator, *Stephen Lawrence*, in and by the preceding Interrogatory mentioned and enquired after,

over and above what you, &c. as before? If Yea, set forth a full, true, and particular Account of all and every such Sum and Sums of Money, distinguishing the Particulars thereof, together with the Names of the Persons or Person from and by whom and for what and from and to what Time in particular the same were or was so possessed or received, and all the Particulars relating thereto.

Third Interrogatory. Have or hath not you or any and what Persons or Person by your Order or with your Privity or Consent, paid, disbursed, or allowed any and what Sum or Sums of Money, by or out of the Rents and Profits, or for or on account of the Estates of the said Testator *Stephen Lawrence*, in and by the preceding Interrogatories mentioned and enquired after, *over and above, &c. as before.* If Yea, set forth a full, true, and particular Account of all and every such Sum and Sums of Money so paid, disbursed, or allowed, distinguishing in such Account, the Times when, and the Names of the Persons by and to whom, and for what, the same and every Part thereof have or hath been so paid, disbursed, or allowed, and all the Particulars relating thereto, fully and at large.

Interrogatories for the Examination of *Parties in the Cause* are prepared by the Solicitor, and settled by the Master (a); they are not signed by Counsel; and if any Fee should be given, it would be disallowed in Costs between Party and Party, and not allowed between Attorney and Client; very special Enquiries might lay a Ground for advising with Counsel, but the Fee given would not be allowed as Costs in the Cause.

A Copy of the Interrogatories fairly transcribed on unstamped Draft Paper, must be left with the Master, and a Warrant taken out, on leaving them underwritten as follows: "The Plaintiffs have left a Draught of Interrogatories, for the Examination of the Defendants, the Executors."

(a) 17 Ves. 434. 19 Ves. 193.

Correct Copies of this and all other Warrants, together with the Notice at the Foot, must be served on the Clerks in Court for the Defendants, or their Copying Clerks, at their respective Seats in the Six Clerks' Office: every Warrant must be served two Days before the Day of Attendance, as Thursday for Saturday, and Saturday for Tuesday. The first is called a Warrant on leaving, and is not to be attended; it is served only to give Notice to the adverse Parties, that they may apply for Copies of the Interrogatories left at the Master's Office. On the Return of the Warrant, another Warrant must be taken out, underwritten "To settle the Draught of Interrogatories left for the Examination of the Defendants the Executors." This must be copied, and served in the same manner as the former. At the Return of this, which is called a Warrant to proceed, the Solicitor must attend the Master, who will proceed on the Matters referred, if the other Solicitors attend; if they do not attend, another Warrant must be taken out, and served as the last: this is called a Peremptory Warrant, and is underwritten as follows, "Peremptorily to settle the Draught of Interrogatories left for the Examination of the Defendants the Executors." On the Return of this Warrant, if the other Side do not attend, the Master will administer an Oath to the Person who served all the Warrants, of the due Service thereof respectively on the Defendant's Clerks in Court, or their Copying Clerks at their Seats in the Six Clerks' Office, a Memorandum of which Fact he will indorse and sign, and will proceed on the Matter of the Warrant *ex parte*; but if the Solicitors attend on any of the Warrants to proceed, Warrants must be taken out and served successively, until the Subject is fully gone through and settled; but it is not usual to issue another Warrant until the Return of the former. On every Attendance the Master or his Clerk marks in his Book the Names of the Solicitors who attended, and no other Attendances than those so marked will be allowed in Costs. It is therefore necessary for the Solicitor to be care-

ful that his Attendance is marked, lest the Master or his Clerk should omit to do it in the hurry of Business.

This Explanation of the Manner of taking out Warrants, the Service, and Attendance thereon, will be a sufficient Guide to the young Practiser throughout the whole Proceedings. We shall remark any Difference (which will principally consist in the Notice at the Foot of the Warrant) as we proceed.

It belongs to this Branch of our Subject here to observe that in carrying into Effect the Enquiries directed by a Decree, if Matter of serious Difficulty should occur, which it may be advisable to bring under the immediate and particular Attention of the Master, and ultimately of the Court; the most convenient Form in which it can be introduced, would be by a Statement in Writing, comprising all the necessary and material Facts and Circumstances, and any incidental Specialties and Anomalies, in the Shape of a *State of Facts*, a Proceeding which seems to lie upon the Party who is to establish the Affirmative (*a*); in support of which Witnesses may be examined and cross-examined, and if impertinent or scandalous Matter should be introduced, it may be expunged (*b*): the usual Warrants on leaving the State of Facts to proceed, must be taken out, attended and proceeded on, and the Matter of Objection will, in this Shape, be regularly brought before the Master for his Consideration and Decision.

The Interrogatories being settled, the Master's Clerk ingrosses them on Parchment with a five Shilling Stamp, and the Master signs his Allowance at the Foot or Margin of the Ingrossment, and gives a Certificate of his Allowance, which the Solicitor must file at the Report Office, and take an Office Copy.

It has been held, that Objections to Interrogatories, settled by the Master, should be taken by Exceptions to the Master's Certificate, settling the Interrogatories (*c*); and

(*a*) 19 Ves. 596. Arg.

(*c*) 6 Ves. 458.

(*b*) 18 Ves 114.

there are Instances of that Course of Proceeding having been taken. But it has been recently determined, upon overruling an Exception taken to the Master's Certificate of allowing Interrogatories for the Examination of a Creditor coming in under a Decree, that an Exception will not lie to the Master's Certificate of having settled Interrogatories, but that the Interrogatories ought to be put to the Party, who answers as much or as little as he pleases, and then the Master is to certify whether the Examination thereto, is or is not sufficient; that an Exception may be taken to that Certificate, but not to the Certificate settling the Interrogatories. (a)

To hasten the Defendants in the preparing and putting in their Answer and Examination to the Interrogatories, it may be necessary to take out a Warrant for them to bring in their Examination; this Warrant is thus underwritten: "At which Time the Defendants the Executors, are to bring in their Examination." The Master, at the Instance of the Defendants, upon a Warrant taken out for that Purpose, will indulge them with a reasonable Time to prepare their Examination, and sometimes their Solicitor signs the Master's Book, undertaking to put in the Examination by the Time limited. and to pray no farther Time, or they may procure an Order (b) for a Month's further Time, by Petition to the Master of the Rolls: or it may be done by Motion, which is of course: but if, after the Service of three Warrants to bring in the Examination, and after the extended Time with which the Master or the Court may think fit to indulge the Defendants is expired, they make Default in putting in their Examination; the Master on the usual Oath of Service of the three Warrants, will give his Certificate that the Examination is not put in, which must be filed at the Report Office, and an Office Copy taken: upon which Instructions must be given to Counsel to move the

(a) 16 Ves. 243. Dick. 548.

(b) For the Order, see Hands' Chanc. 138.

Court, “ that the Defendants may put in their Examination within four Days, or that the Serjeant at Arms may be ordered to take the Defendants into Custody.” (a) It is usual to add to the Application, “ that Service of the Order on the Defendant’s Clerk in Court may be deemed good service ;” otherwise the Order must be served *personally* on the Defendants. The Order being drawn up and *personally* served upon the Clerk in Court, if the Defendants do not put in their Examination within the Time limited, the Solicitor must apply to the Master on a Certificate of their Default ; which must be forthwith filed at the Report Office, and an Office-Copy taken ; and on the same Day an Application made to the Court, grounded on the Certificate and Affidavit of the Service of the former Order, for an Order that the Defendants may stand committed to the Custody of the Serjeant at Arms. The Serjeant at Arms, if he is in Court when the Order is made, will draw up the Order, and will apply to the Solicitor for Instructions ; or the Solicitor must draw up the Order, and deliver it to the Sergeant at Arms, or to his Deputy, with proper Instructions, and he will procure a Warrant from the Lord Chancellor’s Secretary, and take the Defendants into custody, where they must remain without Bail, until they have put in their Examination, and cleared their Contempt by paying the Costs, which are very heavy. Every Defendant pays separate Costs, and a Bill of Costs is made out by the Serjeant for each Party.

TRINITY TERM, 1821.

If the Defendants or either of them, reside in the Country, above twenty Miles from London, an Order (b) must be obtained by them, for a Commission to take and return their Examination, which will be made as of course, upon producing the Master’s Certificate (c), that a Commission is

(a) For the Order, see
Hands’ Chan. 139.

(b) For the Order, see *ib.* 135.
(c) See Hands’ Chan. *pa.*
262.

necessary ; and the Plaintiff's Solicitor, upon Service of the Order, will be called upon for Commissioners' Names, to take the Defendant's Examination, with which he must furnish his Clerk in Court : and if the Defendant's Solicitor should apply at the Master's Office for the original Ingrossment of the Interrogatories, for the Purpose of annexing it to the Commission, which is often, though very irregularly, done, the Plaintiff's Solicitor should oppose this Application, and should insist upon a Duplicate being made and delivered out to the Defendant for the above Purpose : a Practice strictly attended to in some of the Master's Offices. The Time for returning the Commission is not limited by the Order, the Master is the proper Judge of that, and the Order is made for a Commission generally (a). The Plaintiff's Solicitor must, therefore, take out a Warrant for Defendants, to bring in their Examination, and the Master will appoint a Time, and if a peremptory Day be fixed, and the Examination be not then brought in, the preceding Instructions must be followed to enforce it.

On the coming in of the Examination at the Master's Office, an Office-Copy is made thereof by the Master's Clerk, for the Plaintiff's Solicitor, and such other of the Solicitors whose Clients are interested, and require it : but if taken by Commission, the Solicitor must obtain an Office-Copy from his Clerk in Court : and it may not be improper to observe, that there is no Order of Court requiring an Examination to be signed by Counsel, and though frequently signed, it is not objectionable, if the Signature of Counsel be wanting (b). On this Examination, the Party who left the Interrogatories may ground any of his subsequent Proceedings in taking the Accounts, and ascertaining the Fact for the Discovery of which the Interrogatories were framed.

The Examination, in the first place, should be carefully perused, and compared with the Interrogatories, in order to

(a) 5 Ves. 683.

(b) 18 Ves. 287.

see that they are fully answered. If the Examination should appear insufficient, or not fully to answer the Interrogatories, an Application must be made to the Master of the Rolls by Petition, or it might be done by Motion in Court; but for Expedition, the former is the better Method, praying that the Interrogatories and the Examination may be referred to the Master, to look into the Examination and into the Interrogatories, and certify whether the Examination be sufficient or not; on which an Order will be made as prayed, which must be drawn up, passed and entered at the Register's Office, served on the Defendant's Clerk in Court, and left with the Master, who will thereupon grant a Warrant to proceed on the Reference to him upon that Point. If the Defendant's Solicitor does not attend the first and second Warrant, the third Warrant is peremptory; and on the Service of three Warrants being proved on Oath, the Master will proceed *ex parte*. If the Defendant's Solicitor attends, the Master hears both Parties; and the Plaintiff's Solicitor points out to the Master those Interrogatories, or such Parts of them, which he conceives are not answered; and the Defendant's Solicitor is then called upon to shew from the Defendant's Examination that a full Answer has been given: if, upon hearing both Parties, the Master should decide that the Examination is insufficient, he must in his Certificate particularize the Interrogatory which is not answered, or the Part of an Interrogatory not answered. This Certificate not being open to Objections, requires no Confirmation by the Court: it must be filed in the Report-Office, and an Office-Copy taken to ground further Proceedings. The Plaintiff's Solicitor usually takes out a Warrant for Defendants to bring in their Examination, but this is a Matter of Courtesy: The Plaintiff's Solicitor would be strictly regular in applying immediately, by Motion as of course, upon the Master's Certificate, for an Order upon the Defendants to put in their Examination in four Days, or to stand committed to the Custody of the Serjeant at Arms. This Order must

be drawn up, passed and entered, and *personally* served upon the Defendant's Clerk in Court; and at the Expiration of the four Days after Service, if upon a Search at the Master's Office the Defendant's further Examination be not put in, nor an Order for Time served, nor Exceptions to the Certificate filed and *set down*: the Master's Certificate of the Default must be obtained and filed, and a Motion as of course made, and an Order obtained to make the former Order of Commitment absolute, upon the Master's Certificate dated on the Day when Motion made (*a*). The Serjeant at Arms usually draws up this latter Order; and upon Instructions from the Plaintiff's Solicitor, the Serjeant at Arms will obtain a Warrant from the Lord Chancellor's Secretary to take the Defendants into Custody, and bring them to the Bar of the Court, from whence they will be committed to the Custody of the Warden of the Fleet Prison, there to remain till they have cleared their Contempt, by putting in their Examination and paying the Costs, which are usually directed to be taxed: after the Examination has been reported insufficient, the Plaintiff may, by special Order, obtain Leave to add new Interrogatories for the Examination of the Defendants, and that Defendants may answer both Sets at the same Time; but the Court will not make the Order as of course (*b*). A further Examination may be referred for Insufficiency, and the like Proceedings taken, until a sufficient Examination has been obtained: the Examination may be referred for Impertinence, but if the Master certify it to be so, he must state in what respects he considers it to be impertinent (*c*). It may be useful further to remark, that if the Defendants are in Custody for want of their Examination, they must be discharged by the Plaintiff's Solicitor or Clerk in Court, immediately on the coming in of their Examination: however objectionable the Examination may appear to be, they can-

(*a*) 14 Ves. 180.

(*c*) 3 Madd. 246.

(*b*) 3 Atk. 511. 19 Ves.

116. 3 Madd. 282.

not be detained in Custody, until the Sufficiency of the Examination be ascertained (*a*); and if upon putting in their Examination, they obtain an Order for their Discharge on Payment, or Tender of the Costs of Contempt, the Order is *imperative* on the Warden or Gaoler; upon Production of the Order, and a Receipt from the Solicitor or Clerk in Court, for the Costs, or an Affidavit of the Tender of the Costs: if the Warden or Gaoler refuse to discharge the Defendants out of Custody, as to the Commitment for the Contempt, no further Order for their Discharge is required: the Refusal would be a Contempt of the Order, and the Defendant must proceed in the ordinary Course of enforcing Obedience to the Orders of the Court (*b*); but if upon a Reference the further Examination be reported insufficient, and the Plaintiff's Clerk in Court has not accepted the Costs, it should seem as in the Case of an insufficient Answer, that the Court might be disposed to take up the Process where it dropped, and upon Motion and Certificate make an Order absolute for Commitment in the first Instance, and not put the Plaintiff to begin *de novo* (*c*): and if a Commission for the Examination of Witnesses, to falsify an Examination taken by the Master, should be required, it cannot be issued without a Certificate from the Master of the *Necessity* of such a Commission (*d*). Where an Examination of Defendants to Interrogatories exhibited by the Plaintiff has been taken by a Commission made out by one of Defendant's Clerks in Court, and returned to the Six Clerks' Office, Lord Eldon decided that the Clerk in Court for any other Defendant is entitled to make Office-Copies of the co-Defendant's Examination (*e*), though the Course of Practice in the Six Clerks' Office had been contrary.

If an Examination taken before the Master, in pursu-

(*a*) 18 Ves. 287. 1 Sim. and Bea. 324, 331. 2 Ves. and Stu. 72. and Bea. 372.

(*b*) 1 Madd. Rep. 109.

(*d*) 2 Cox., 108.

(*c*) 18 Ves. 287. 1 Ves.

(*e*) 3 Ves. and Bea. 176.

ance of a Decree, is satisfactory to the Master, but not so to the Parties in the Cause, the Course of Practice, as laid down in a Work of Authority, is to apply, as of course, for an Order to refer the Examination back to the Master, to look into it and see whether it be sufficient or not, in *general* Terms, and without stating any *particular* Points of Objection (*a*); and that if the Master reports it sufficient, an Exception may be taken to his Report, and the Judgment of the Court obtained thereon: but the Author observes that the taking Exceptions in the same *general* Manner is inconvenient, and discouraged, and that an Exception so taken and over-ruled, has been considered by the Court a Ground for giving Costs beyond the Deposit (*b*).

The *second Advertisement for Creditors* to come in and prove their Debts, may be had from the Master about a Month or Six Weeks after the Insertion of the first in the Gazette. The second Advertisement is called a *Percemptory Advertisement*, from its Import, and limiting the Time within which the Creditors must bring in and substantiate their Claims before the Master. But although the Time mentioned in this Advertisement should be expired, the Master will allow the Creditors to proceed on their Claims at any Time before his Report on the Matter referred to him is prepared and settled. The Solicitor should furnish himself with the Gazettes, to shew that the Advertisements have been inserted, and particularly that containing the *peremptory Advertisement*: some of the Masters require that these Gazettes should be left in their Office, to be referred to if required.

The Production of Books, Papers, and Writings, in the Custody or Power of the Defendants, or of any Party in the Cause, relating to the Matters in Question, where such Directions are given by the Decree, may be made effective, by taking out a Warrant at the Master's Office, underwritten as follows: "At which Time the Defendants

(*a*) 2 Madd. Chan. 500.

(*b*) 12 Ves. 166.

G.W. and W. F. are to produce and leave with me all Books, &c." (following the Words of the Decree): and as it may be necessary to *make Oath* of the Service of the Warrants upon the adverse Clerk in Court, strict Attention should be paid to the Regularity of the Warrants and the Service. After three Warrants taken out and served, the Books, &c. required by the Warrants, must be brought in and left by the Defendants at the Master's Office, together with an Affidavit, stating that they are all the Deeds, &c. in their Custody or Power, or that they ever had; and a Schedule of the Books, &c. if numerous; the Solicitor should examine the Affidavit, to see if it be full and positive, and not qualified by introducing such Words as *to Defendant's Knowledge* (a), (for the Form of the Affidavit, see Title "Affidavit.") If the Defendants refuse, or neglect to produce the Deeds, &c. an Application must be made to the Master for his Certificate of the Default, which may be obtained upon Oath of the regular Service of the three Warrants, leaving them in his Office: the Certificate must be filed in the Report Office, and an Office-Copy taken, and an Application made to the Court by Motion for an Order (b) upon the Defendants to produce before the Master, all Books, &c. within four Days, or to stand committed to the Custody of the Serjeant at Arms, which upon reading the Master's Certificate, will be ordered of course: the Order being drawn up, passed and entered, must be served *personally* upon the Defendant's Clerk in Court. If after Expiration of the four Days, the Defendants neglect or refuse Obedience to the Order, a Certificate of such Default must be obtained from the Master, and a further Application, by Motion made on the Day of the Date of the Master's last Certificate (c), for an Order for a Commitment absolutely to the Serjeant at Arms, which upon Affidavit of *personal* Service of the former Order upon the adverse Clerk in

(a) Vin. Abr. tit. Chan. S.
a. pl. 10.

(b) For the Order see Hands'
Chan. 133.

(c) 14 Ves. 180.

Court, and the Master's Certificate dated that Day, will be ordered of course; the Order must be drawn up, passed and entered, and served personally on the Defendant's Clerk in Court. This is an absolute Order of immediate Commitment (a), and to be carried into effect, must be delivered to the Serjeant at Arms, with proper Instructions to apprehend Defendants, as before directed (b): but the Defendants may obtain from the Master such further Time for the Production, by attending the Warrants, as they may shew to be necessary, or they may move or petition the Rolls for an Order for that Purpose, if the Master refuses to give sufficient Time.

If the Master should be satisfied with the Production, and the Plaintiff's Solicitor should not, an Application should be made for an Order upon the Master to receive Interrogatories, or more conveniently that Plaintiff may be at liberty to file Interrogatories for the Examination of Defendants: so, where the Master upon his Construction of the Decree, that a Production cannot be enforced, refuses to give a Certificate of the Default, an Order upon the Party to produce the Deeds, &c. should be applied for; but it is not the Practice, when the Master is satisfied with the Production, to certify his Satisfaction to the Court (c).

When the Defendants have left in the Master's Office the Books and Papers required, an Office-Copy of the Affidavit made on leaving them must be taken, in order to see what Documents are left, and whether the Affidavit be sufficient. If it should be necessary to inspect the Books and Papers left, a Warrant must be taken out and served, underwritten "To inspect the Books and Papers left by Defendants;" but the Master will not permit an Inspection on the first or second Warrant, unless the Defendant's Solicitor attend thereon. On the third Warrant, which should be underwritten *peremptorily*, the Inspection will be permitted in the Absence of the Defendant's Solicitor, on Proof by

(a) 14 Ves. 180.

(c) 12 Ves. 391, 2.

(b) Dick. Rep. 693.

Oath of the Service of the three Warrants, upon the Defendant's Clerk in Court or Writing Clerk, at his Seat in the Six Clerks' Office. If the adverse Solicitor should attend on the first or second Warrant, and there should be Occasion for another Inspection, the Master will allow it on the third or any subsequent Warrant, although the adverse Solicitor should not attend, and the Master's Clerk then superintends the Inspection.

It may not be improper here to subjoin, that a Production of Deeds &c. *merely*, before the Master, accompanied with an Offer of Inspection in the Custody of the Party, and a Refusal to part with the Custody, is not a sufficient Compliance with a Decree ordering *the Production before the Master upon Oath, of all Books, &c. as the Master shall direct*: the Deeds, &c. must be left in the Master's Office, verified by Affidavit, and forthcoming at all Times as Evidence, and open for the Inspection of all Parties interested pending the Enquiry: in a recent Instance, under the usual Directions for Production, the Deeds, &c. were produced before the Master, with a positive Refusal to leave them in his Office: The Master was dissatisfied and granted his Certificate of the Default, and upon that Certificate an Order *nisi* for Commitment had been obtained; and the Question was brought before the Vice-Chancellor upon an Application to discharge the Order *nisi* for Irregularity; the Court refused the Application with Costs, considering the Master at liberty to use his Discretion as to the Course of Proceeding to take the Account directed by the Decree (a).

As incidental to the Production of Documentary Evidence before the Master, it seems by no Means improper here to remark that Lord Eldon, with reference to the Production, has laid it down as a *General Rule*, that an Executor representing an Estate, must deposit Papers and Writings, for the Benefit of the Parties interested, in the Office of the Master, unless there are other Purposes which re-

(a) Hartley v. Ikin, 29th April, 1823.

quire that he should retain them in his own Hands; that it is the bounden *Duty* of an Executor, to keep clear and distinct Accounts of the Property he is bound to administer. If he, therefore, chooses to mix the Accounts with those of his own Trading Concerns, he cannot thereby protect himself from producing the Original Books, in which any Part of these Accounts may be inserted; and if a Partner in Trade has been permitted so to mix them in the Partnership Account, the latter cannot object to the Production, more especially where the Trust-Money has been lent, and the Firm has been dealing with it (*a*). And in Suits between Principal and Agent, where the Accounts have been mixed, the Production has been ordered, directing such Parts of the Account as did not concern the Principal, to be sealed up, the Agent pledging himself by Affidavit to seal those Parts only (*b*). A Trustee admitting by his Answer the Possession of Title Deeds, has not been allowed to protect himself from the Production in the Master's Office, by insisting upon the Rule that they had not been set out by *Schedule* to his Answer; the Court observing that the Objection applied only to Cases of Discovery, ordered the Production (*c*).

In carrying the Directions of a Decree for taking an Account of personal Estate into effect, preparatory to proceeding upon the Executorship Accounts, some preliminary Observations on the Nature and Application of *Assets*, the *Marshalling*, and the *Order and Priority of Debts*, may serve as Instructions for preparing and supporting the Charge upon the Executors for the personal Estate in their Hands, and for proceeding upon and arranging the Charges and Claims of Creditors and Legatees.

Assets are distinguishable into *legal* or *equitable*, *real* or *personal*.

Legal Assets constitute the Fund for Payment of Debts,

(*a*) 3 Meri. 30.

(*c*) 6 Madd. 97.

(*b*) 1 Wils. Ch. Rep. 222.

according to legal Priority. Such as can be reached only by the Aid of a Court of Equity, are termed *equitable Assets*, and are devisable *pari passu*, amongst all the Creditors, under which is included every thing which the Debtor has by his own Act subjected to the Payment of his Debts, which without such Act would not have been subject to his Debts generally (*a*). Equitable Assets in the Hands of Executors, as between Executors and Legatees, are applied as legal Assets are, first to the Payment of Debts, and then of Legacies (*b*), with this Difference, that in the Application of equitable Assets, all the Creditors take *proportionably*, and not in a Course of Administration, as in the Case of legal Assets (*c*). And where a Testator lets in Creditors by a *Charge*, they are to be paid in preference to Legatees (*d*); and so a voluntary Bond.

Real and personal Assets are ordinarily administered in regard to *specialty Debts*, as follows: *First*, The personal Estate not specifically bequeathed, or excepted, either by express Words, or by plain manifest (*e*) Intention. *Secondly*, Land expressly devised or ordered to be sold for Payment of Debts merely charged (*f*). *Thirdly*, Estates descended (*g*). *Fourthly*, Real Estates specifically devised, subject to, or generally charged with the payment of Debts (*h*): the same Rule respecting the Order of administering, is observed in payment of *simple Contract Debts*, with an Exception only as to Estates descended, which are not subject to the Payment of simple Contract Debts (*i*), unless with an Exception as to Copyhold Estates, the de-

(*a*) 2 Fontbl. Eq. 390.

(*b*) 2 P. Wms. 552.

(*c*) 2 Vern. 62.

(*d*) 12 Ves. 155.

(*e*) 1 Br. C. C. 58, 145, 240.

2 Br. C. C. 259. notis. 2 Atk.

58, 624. 8 Ves. 124, 305.

(*f*) 1 Atk. 421, 427. 1 Br.

C. C. 240. 528. 8 Ves. 124,

(*g*) 2 Atk. 58, 624. 1 Br.

C. C. 454. 8 Ves. 124. 3

Madd. 453.

(*h*) 3 Ves. 117. 8 Ves. 124,

306. 1 P. Wms. 505. 2 Br,

C. C. 263.

(*i*) 8 Ves. 381.

used Debtor was, *at the Time of his Death, a Trader*, then the Meaning of the Bankrupt Laws (a); for ascertaining which, Directions are now given as of course, in every Decree, for taking an Account of Assets.

The personal Estate is the *primary Fund*, applicable to the Payment of Debts, which it should seem as against creditors cannot be exempted; but although it be originally liable, the Testator may, as to his Heir or personal Representative, exempt the Sale of it by express Words, or plain manifest Intention, as by giving it as a specific Legacy (b); or as a mere Charge, or the Creation of a Term for Payment of Debts, will not alone raise such an Intention of Exemption (c). A Devise of real Estate for Payment of Debts, will not exonerate the personal Estate (d); but a Direction to apply a particular Portion of the real Estate in Payment of a particular Debt, will exonerate the personal Estate towards that Debt (e). And so a clear Intent in Favour of a legatee to exonerate; but if, by the Death of the Legatee, the Legacy lapses, the Next of Kin cannot insist on the Exemption, it devolves in the ordinary course (f). The personal Estate is applicable to the Payment of a Mortgage, though Children should be unprovided for: the same Rule holds in favour of a Devisee (g), or Heir, but not against creditors, whose Debts might thereby be lost (h). A Covenant to pay Money borrowed, in case of a purchased or descended Estate, does not bind the personal Estate (i), unless a contrary Intention is shewn, or the Charge is Part of the Price, or both real and personal Estates are pledged (k).

(a) 47 Geo. 3. Sess. 2. 34.

4.

(b) 1 Atk. 264. 3 Ves. 552,

11.

(c) 1 Br. C. C. 144, 458.

2. Temp. Talb. 202, 208.

P. Wms. 325. 2 Atk. 58.

Ves. 306.

(d) Pr. Ch. 456. 4 Ves. 816.

(e) 11 Ves. 186. 1 Ves. and

Bea. 418.

(f) 3 Br. C. C. 224.

(g) Ambl. 173.

(h) 2 Atk. 487.

(i) 2 Br. C. C. 58. 3 Ves.

131. 5 Ves. 528. 14 Ves. 417.

(k) 3 Ves. 128, 131. 2 Br.

C. C. 608.

Where a Person, Master of both Funds, charges a personal Debt on the Land, the personal Estate shall not exonerate the Real, so of a Purchase of the Equity of Redemption (*a*). By a Devise of Land, in Trust to sell for Payment of Legacies, giving a Legacy to the Heir, the Land is not changed into personal Estate: sufficient only to pay the Legacies will be directed to be sold (*b*). And where real Estate is directed to be converted into personal, for a Purpose which fails, either wholly or in part, to that Extent it must be considered real Estate (*c*). Where the Words of a Will are, “ my Debts and Legacies being first deducted, I devise all my Estate real and personal to J. S,” this has been held a Devise to sell for Payment of Debts (*d*). So a Direction in a Will to Trustees to possess themselves of the Testator’s “ Estates and Substance ” to pay Debts, has been held a Charge upon the real Estate (*e*). And where a Testator wills “ that his Debts be paid,” or in the introductory Part, that his Debts, Funeral, and Testamentary Expenses; or devises “ after Payment of Debts,” the Debts are charged (*f*): but a Devise in Trust for payment of Debts, does not revive a Debt upon which the *Statute of Limitations* has taken effect by the Effluxion of Time before the Testator’s Death (*g*).

Where Sums have been directed by a Will to be raised by *Rents and Profits* within a particular Time, and the Estate not answering the Charge, a *Sale* has been directed: and so a *Sale* has been directed on the Words *Rents and Profits* alone (*h*); but where a *Trust* was created for Payment of Debts, by Perception of Rents and Profits, or by mortgaging, the Land cannot be sold, as if only the Words

(*a*) 2 Br. C. C. 107, 154.

(*b*) 2 Vern. 425.

(*c*) Ves. and Bea. 174.

(*d*) 1 Vern. 45.

(*e*) 6 Ves. 347.

VOL. I.

(*f*) 3 Ves. 550, 739. 6

Madd. 33.

(*g*) 2 Ves. and Bea. 275.

1 Sch. and Lefr. 109.

(*h*) 2 Vern. 26. 6 Madd. 119.

“ Rents and Profits ” had been used (*a*). By the Statute of Frauds the Trust of a Fee is Assets at Law, but the Trust of a Term is not (*b*). An Estate for three Lives granted to Executors and Administrators, is personal Estate, and will, on the Death of the Grantee, be liable to simple contract Debts (*c*). So a Lease for Years, or a Bond, or a Grant of an Annuity, will be applied in a Course of Administration (*d*). The Right of Admission into a Theatre is personal Estate, and passes under a residuary Clause (*e*) ; and the Produce of Sale of the Good-Will of a Public House, held on by the Administratrix, is Assets (*f*). The Inventory exhibited by the Executor in the Spiritual Court, is Evidence of Assets to the Amount therein stated (*g*), and after putting in an Inventory, it lies upon the Executor to discharge himself of the Items, but sperate Debts are not Assets without some presumptive Proof of Payment (*h*).

An Estate *pur autre vie*, though it be devised, will be liable to Debts by Specialty, to contribute in a Course of Administration, according to the gross Value. Since the Statute 14 Geo. 2. c. 20. s. 9. it should seem that an Estate *pur autre vie*, when limited to Executors, must be considered not as Freehold, but as personal Estate (*i*). A Power to charge, unless executed, is not Assets for Debts (*k*), but a defective Execution of a Power will be supplied. An Advowson in gross is Assets by descent at common Law for specialty Debts (*l*). An Equity of Redemption is not equitable Assets as against Judgment Creditors ; if mortgaged, a Judgment Creditor may redeem (*m*). By a Devise

(*a*) 2 Atk. 104. 1 Br.C.C. 311.

(*b*) 2 Vern. 248.

(*c*) 2 P. Wms. 381.

(*d*) 3 P. Wms. 342.

(*e*) Clarke v. Barker, Trin.

1821. MSS.

(*f*) Peake, N. P. 74.

(*g*) 1 Esp. 313.

(*h*) 1 Stark. 32.

(*i*) 3 Atk. 465. 2 Ves. 681.

4 T. Rep. 230.

(*k*) 7 Ves. 499. 1 Cox. 131.

2 Freem. 279.

(*l*) 7 Ves. 447. 8 Ves. 447.

3 P. Wms. 398.

(*m*) 4 Ves. 538.

of Lands to an Executor and his *Heirs in Trust to sell*, the Lands are *equitable Assets*, for as the Land must go in a Course of Descent, he must take as Trustee, and not as Executor (*a*): and wherever Lands are devised to the same Persons who are Executors, the Assets will be *equitable Assets*; so where the Land is devised to them, or to them and their Heirs, in both Cases they are equitable Trustees (*b*), the Descent is broken, and the specialty Creditors have lost their Fund. A mere Charge, that does not break the Descent, has been decided to be equitable Assets; and so a Devise of an Estate charged with Payment of Debts, the Estate is equitable Assets (*c*). An Equity of Redemption of Freehold (*d*) or Leasehold (*e*) Estates is equitable Assets; but Chattels mortgaged and redeemed by Executors, have been held Assets at Law for the Surplus, though recoverable only in Equity (*f*). A Domicile in India being in legal Effect a Domicile in the Province of Canterbury, the Law of England is to be applied in the Distribution of personal Estate (*g*).

It is an established Principle in the Administration of Assets by a Court of Equity, that a Creditor having two Funds liable to his Claim, his Choice shall not have the Effect of disappointing another, who has only one to resort to, but he shall take to that which shall leave another Fund for another Creditor (*h*). Hence the Term, *Marshalling of Assets*.

This Rule is of great Importance, for where there are Creditors, and Legacies are given to Children for Portions, if the Creditors were suffered to exhaust the personal Estate, it might be the Ruin of Families (*i*). It takes place

(*a*) 2 Vern. 133.

(*b*) Dick. 387.

(*c*) 2 Atk. 293. 8 Ves. 26.
7 Ves. 319.

(*d*) 1 Atk. 60. 2 Atk. 294.

(*e*) 3 P. Wms. 341. 8 East. 465.

(*f*) 3 P. Wms. 344.

(*g*) 5 Madd. 379.

(*h*) 8 Ves. 388. 395. 9 Ves.
209.

(*i*) Ambl. 128.

in Favour of simple Contract Creditors and Legatees, Devisees and Heirs, (a) and a few other Cases, but not in favour of the next of Kin (b), nor to pay Charity Legacies (c), nor as it should seem in favour of an Executor, or Residuary Legatee (d). To let in Creditors upon the personal Assets, the Court will direct a Debt due to the King, to be satisfied out of the real Estate (e). Where a Mortgagee of Freehold and Copyhold Estates, and who is likewise a Specialty Creditor, exhausts the personal Assets, the simple Contract Creditors are intitled to stand in his place *pro tanto* against both Freehold and Copyhold Estates (f). Legatees are intitled to marshal as against Estates *descended*, but not as against Estates *devised*, unless the Land devised be expressly subjected to Debts (g), or mortgaged: and a Widow in right of her *bona Paraphernalia* has a Claim to marshal the Assets as against real Estates *descended* (h), but not against real Estates *devised* (i). Where a Creditor subjects a specific Legacy to his Debt, the specific Legatee in a Court of Equity will stand in his Place, and so will pecuniary Legatees (k).

The Payment of Debts is a leading Duty of an Executor; the Order in which Assets are administered, and what constitutes a legal Debt are pure Questions of Law; and where a Doubt is entertained, the Course is to retain the Bill with Liberty to the Party to proceed at Law: in disposing of the personal Estate of the Deceased, the Order of Payment is thus laid down in a Work of authority (l):

“ 1st. Funeral Charges and Expences of Probate or taking out Letters of Administration (m); 2ndly. Debts due to the

(a) 4 Bro. C. C. 411.

(h) 1 Atk. 441. 3 Atk. 369.

(b) 1 P. Wms. 680. Ambl. 158. 217. 704. 714.

(i) 2 P. Wms. 544. notis Ambl. 6.

(c) 2 Ves. 52. 4 Br. C.C. 153.

(k) 1 P. Wms. 729. 2 P. Wms. 81. 190.

(d) 1 Ves. 252.

(l) 2 Selw. N. P. 708.

(e) 1 Vern. 455.

(f) 7 Ves. 460. 8 Ves. 382.

(m) 3 Atk. 119. Bull, N. P.

(g) 1 P. Wms. 201.

143.

King by Record or Specialty (*a*) ; 3dly. Debts due to the Post-Office, not exceeding 5l. (*b*), Debts due from an Overseer of the Poor, by virtue of his Office (*c*) ; 4thly. Debts by Mortgage (*d*), by Judgments in the Courts of King's Bench, Common Pleas, and Exchequer, doggitted according to Stat. 4. & 5. W. & M. c. 30, and in other Courts of Record ; and by Decrees in Courts of Equity, according to their respective Priorities (*e*) ; 5thly. Recognizances at Common Law ; Statutes Merchant and Staple(*f*), and Recognizances in the Nature of Statutes Staple, pursuant to Stat. 23 Hen. 8. c. 6, forfeited ; 6thly. Arrears of Rent due at the Death of the Testator or Intestate, either on a Parol Lease, or Lease by Deed (*g*), Debts by Specialty, as Bonds, Damages upon Covenants broken, &c. ; 7thly. Debts by simple Contract, as Bills of Exchange, Promissory Notes, Bankers' Checks, Shop-Debts, &c. ; 8thly. Legacies."

A Judgment not doggitted, in a Course of Administration, may be postponed to a Bond-Debt ; at Law it could not be pleaded against a simple Contract Debt (*h*) : a Warrant of Attorney is not a Specialty within the Statute of Limitations, it could not be declared on as such, but must be taken to be a Contract without Specialty (*i*). The Recital of a Debt in a Deed, does not make it a Specialty Debt (*k*) ; and in distributing the Assets of a Feme covert deceased, a Bond-Creditor has no Priority, the Bond considered as such is void (*l*).

To pursue this Subject further, would exceed the Limits

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| (<i>a</i>) 2 Stat. 22. 33. Hen. 8.
c. 39. | (<i>f</i>) 4 Rep. 59. b. 5. Rep.
28. b. |
| (<i>b</i>) 9 Ann, c. 10. s. 30. | (<i>g</i>) Carth. 511. 3 Lev. 267.
Ld. Raym. 516. |
| (<i>c</i>) 17 Geo. 2. c. 38. s. 3 | (<i>h</i>) 1 Esp. 313. 6 T. R. 384.
1 Bos. and P. 307. |
| (<i>d</i>) 1 Bro. P. C. 66. | (<i>i</i>) 2 Stark. 234. |
| (<i>e</i>) 1 Stra. 1028. 3 P. Wms.
401. n. Ca. Temp. Talb. 217. | (<i>k</i>) 1 Ves. 313. |
| 4 Bro. P. C. 287. 11 Ves. 125.
19 Ves. 585. | (<i>l</i>) 8 Ves. 258. |

of this Work ; from the preceding Observations, sufficient may be collected to enable the Junior Practiser to investigate real and personal Assets, and to meet the Specialties of a variety of Cases which may occur : if more extensive Information be required, the elaborate Productions of the able and learned Authors before referred to, will be found sufficiently instructive for every Purpose (*a*).

Having the Materials to prepare the Charge against the Defendants the Executors, it may be useful to observe that if the Decree directs the Master in taking the Accounts to distinguish what is Principal of the Testator's personal Estate, and what is Interest, it will be necessary to make that Distinction in the Charge, as it frequently happens that the Executors make no such Distinction in their Accounts. All Monies due in the Testator's Life Time, and owing at his Death, (although a Part might have been Interest on Mortgages, Bonds, or other Securities) are considered as Principal : the Interest to be calculated pursuant to the Decree is such only as hath accrued due on Mortgages, Bonds, and other Securities carrying Interest, and on the Testator's personal Estate, if put out to Interest by his Executors since his Decease : the Executors may be charged with Interest on Balances in their Hands, though not prayed by the Bill, where they arise subsequently (*b*) : and if in forbearing to sue, any Loss is incurred, the Executor may be charged for wilful Default (*c*) ; but this Liability would cease, if the Fund be retained with the Acquiescence of the Party intitled (*d*). After a Bill filed, an Executor will not in strictness be allowed Payments *voluntarily* made without Suit : a Judgment confessed by an Executor pending a Suit in Equity, will not be allowed in an Account of Assets (*e*) ; so in the Courts of Law, after Action brought, the Executor cannot pay another Creditor, unless the Latter

(*a*) Madd. Chancery, Toller.
Ex. Selw. N. P. Com. Dig.

(*b*) 1 Ja. and Wa. 43.

(*c*) 1 Wils. Rep. 222.

(*d*) 2 Cox. 63.

(*e*) 1 Vern. 457.

has obtained a Judgment (a); but the Executor may confess a Judgment to a Creditor in equal Degree with the Plaintiff, pending the Action (b), and the Consent of one Executor will bind all the others, either in or out of Court (c).

The Charge upon the Executors is usually taken from the Schedule to the Defendant's Answer or Examination or Evidence aliunde in the Cause; for the Form see Title, "*Charges and Discharges*," in a subsequent Part of this Work. The Charge must be copied upon unstamped Paper, and left at the Master's Office, and a Warrant taken out at the Time of leaving, which must be served in the usual Manner on the Defendant's Clerk in Court, and underwritten as follows:—"The Plaintiffs have left their Charge against the Defendants G. W. and W. J. for the personal Estate of the Testator, received by them." Every other Warrant on the Charge must be underwritten, "to proceed, (or peremptorily to proceed as the Case may be) on the Plaintiff's Charge against the Defendants G. W. and W. J." On attending the Master, the Plaintiff's Solicitor in support of the Charge, reads from the Office-Copy of the Defendant's Answer and Examination, or from any other Evidence, such as entries in Books of Account, &c. the several Items which compose the Charge, and if in proceeding, any Item should be disputed, a Query is set against it, and a Warrant must be taken out and served underwritten, "To proceed upon and settle the queried Item in Plaintiff's Charge; and upon the Attendance, when the Query is disposed of, and the whole Charge gone through, and all Queries displaced, the Master marks the Charge *allowed*, which should be carefully attended to: this Proceeding may be the Subject of Attendance on several Warrants.

(a) 1 P. Wms. 295. 3 P.
Wms. 401.

(b) 1 P. Wms. 295. Forr.
225.

(c) 4 Madd. 51.

The Proceedings on the Charge against the other Executors are similar where they account separately.

When the Charges have been allowed, unless the Defendants bring in their Discharge immediately, a Warrant must be taken out to compel them so to do. Three Warrants must be taken out and served, and the Service verified upon Oath before the Master will prepare his Report. The Warrants should be underwritten as follows: "At which Time the Defendants G. W. and W. J. the Executors, are to bring in their Discharge." The third Warrant is peremptory, and should be so underwritten. When the Defendants have brought in their Discharge, an Office-Copy must be taken, and the Warrants taken out by the Defendants to proceed thereon attended. If the Defendant's Solicitor does not proceed upon their Discharge with that Expedition which the Rules of Practice permit, the Plaintiff's Solicitor may take out a Warrant to proceed and serve upon the Defendant's Clerk in Court. Those Warrants should be underwritten, "To proceed on the Defendant, G. W. or W. J.'s Discharge."

In Case of affected Delay, either Party may take out Warrants to proceed on any Subject before the Master, without regarding which Party furnishes him with the particular Subject on which the Proceedings are founded: or an Order may be obtained to authorize the Master to proceed *de die in diem*, which is not *imperative* on the Master,—he may avail himself of it, or not, in his Discretion (a). A co-Defendant, if interested in taking the Account against the Executor, it should seem may apply for Leave to attend the Master in taking the Account (b).

When the Warrant on the Discharge is attended, the Master will require the Defendant to produce Vouchers for all his Payments above 40s. All Sums not exceeding 40s. will be allowed from the Answer or Examination, swearing peremptorily to the Fact of Payment, for what and to whom

(a) 11 Ves. 362. 5 Ves. 423. (b) 16 Ves. 49. 2 Madd. Cha. 469,

paid, and not qualified by Belief (*a*), unless it appears to be a Payment for which a Receipt ought to have been taken: and in an old Case, it is said that they should not exceed £100 in the whole (*b*); but the Court in one Instance directed the Master to allow upon Affidavit *Items*, the Vouchers of which had been impounded in the Ecclesiastical Court (*c*). The Admission in the Defendant's Answer, or Examination, may be read against him in support of the Charge, but not for him; nor can he make it Evidence, but *sub modo*; as where the Discharge immediately follows the Admission, stating as one substantive Act, that he received a certain Sum, which Sum he paid, *uno flatu*, the Application must immediately follow the Receipt. But if the Receipt and Payment are stated as distinct and independent Items, and to have been at different Periods, and not as one Transaction, the Defendant will not be allowed to avail himself of the Payment in his Discharge (*d*); and the like Rule applies to an Affidavit in support of the Discharge.

The Warrants upon the Discharge should be strictly attended, but if the Parties who might resist a Claim do not attend, it is the Master's Duty to take the Account as carefully as if they did (*e*).

The Plaintiff's Solicitor must take Copies of the Charges and Claims of Debts, Legacies, &c. left at the Master's Office, and if any of the Charges or Claims appear objectionable, these Objections must be urged to the Master, upon an Attendance on the Warrants taken out to proceed thereon, who will allow, disallow, or make such Alterations in the Claim, as may appear to him necessary. If any Party should be dissatisfied with the Master's Determination, such Party may afterwards take the Opinion of the Court thereon, by Exceptions to the Master's general Report. The Method of doing this will be explained hereafter.

(*a*) 2 Vern. 176. 2 Ch. Ca.
249. 2 Atk. 410.

(*b*) 1 Vern. 470.

(*c*) 8 Ves. 146,

(*d*) 1 Ves. 546. 7 Ves. 404,
587. 19 Ves. 582. Ambler.

509. 5 Taunt. 246.

(*e*) 2 Sch. and Lefr. 300.

Or if the Party dissatisfied is desirous of a more immediate Determination, he may apply by Motion or Petition to the Court, that the Master may be at Liberty to make a separate Report on the special Matter. The Order passed and entered, and served upon the adverse Clerk in Court, must be left at the Master's Office, and a separate Report made upon the special Matter; and it should seem, the Opinion of the Court may be taken thereon immediately, by filing Exceptions to the Report, and setting them down for Argument. Sometimes the Opinion of the Court may be obtained in a more summary Way, by special Motion, properly adapted to the Case.

In the Administration of Assets, under a Creditor's Bill, Executors are not bound to plead the *Statute of Limitations*; and if they do not, the Creditor filing the Bill will have a Decree on behalf of himself, and all other Creditors, and he will be paid; but the Course of Practice in the Master's Office is, for the Master to take the Objection against other Creditors coming in before him and to exclude from the Distribution those, who, if the Statute of Limitations or other legal Objections are brought forward, cannot make their Claims effective (a): it should be further observed, that an *open Account* between the Testator and a Creditor would not be within the Statute of Limitations (b); for *though Length of Time* forms no Bar to an Account, as *between Merchant and Merchant*; yet if Dealings between them have *ceased for several Years*, and one of them dies, the Survivor must resort to his Remedy at Law (c). If all Accounts have ceased above Six Years, the Statute of Limitations would be a Bar (d). The Difference between Merchant's Accounts and others, seems to be, that as to the former, a Continuation of Accounts afterwards, will prevent the Statute running against the previous Accounts; but as

(a) 15 Ves. 498. 1 Atk.
526. 13 Ves. 469. 19 Ves.
583. 1 Eq. Ca. Abr. 305.

(b) 1 Vern. 456.

(c) 2 Vern. 276.

(d) 18 Ves. 286. 6 Ves. 382.

to others, will be a Bar to all before Six Years; but it should seem, a new Item in any Account, within Six Years, takes the whole Account out of the Statute (a). A *stated Account*, between the Testator and a Debtor, to be available, need not to be *signed* by the Party, for it is not the *signing*, but the keeping it any length of Time without Objection, which binds and prevents entering into an open Account afterwards (b); and amongst Merchants, it is held to amount to an Allowance of an *Account current* (c); with respect to *foreign Merchants*, it is considered as a *stated Account* (d): the Rule that a stated Account shall not be unravelled, and that it carries Interest, will not prevail against an apparent Fraud (e); and where no Fraud is charged, but the Account is directed to stand, with Liberty to *surcharge* and *falsify*, some *specific Error* must be assigned (f); it is not, however, confined to mere *Errors of Fact*; advantage may be taken of *Errors in Law* (g), and the *Onus probandi* is always on the Party having that Liberty. The Court considering it a stated Account, establishes it; if any Omission can be shewn, for which Credit ought to be given, that is a *Surcharge*: if any Item is shewn to be a wrong Charge, that is, a *Falsification*, but it must be by Proof on his Side; and hence the Distinction between general Cases of open Account, and Leave given to surcharge and falsify, for the Latter must be made out (h). A Judgment at Law may be impeached for Fraud, but not for Irregularity (i).

The *Charges and Claims of Creditors and Legatees* coming in under a Decree for administering the Assets, must be brought into the Master's Office, before his *General Report* in the Cause is signed, in strictness before it is finally set-

(a) 6 Term. Rep. 89.

(b) 2 Atk. 252.

(c) 2 Vern. 276.

(d) 2 Ves. 239.

(e) 2 Atk. 119.

(f) 3 Bro. C. C. 266. 5

Ves. 837. 9 Ves. 266. 14

Ves. 579.

(g) 2 Atk. 112.

(h) 2 Ves. 566.

(i) 2 Dow. 529.

tled (*a*). The peremptory Advertisement fixes a Period within which they are to be brought in, but though the Time should have elapsed, they will be let in at any Time, while the Fund is in Court (*b*). And after the Report is filed, and before the Fund is distributed, a special Application by Motion or Petition may be made, and the usual Order obtained for the Master to inquire whether the Party has any and what Claim or Demand on the Estate; but the Party applying must be at the Costs of the Reference.

In a Creditor's Suit, where the Court by its Decree has assumed the Administration of the Assets, a Creditor is not permitted to proceed at Law, he must abide by the Suit: if the Parties are guilty of Delay, which is not accounted for, the Court will give Leave to a Creditor coming in and proving to prosecute the Suit; any Creditor may obtain the Order (*c*): and if the Suit abates, it seems that a Creditor is intitled to revive (*d*); or, as it should seem, he may come in under a general Decree, without reviving (*e*): and if a Creditor coming in be interested in Part only of the Decree, and not in the whole, on the Ground of Delay, he has been at Liberty to prosecute the Suit (*f*); and in a Suit not by Creditors, but by Next of Kin against an Administratrix; for the Purpose of prompting to Diligence, in the Case of unreasonable Delay, the Court has given Leave to a Creditor to prosecute a Decree, improperly neglected to be carried into Effect (*g*); but an *Assignee* of an unascertained Interest in a Suit, cannot upon Petition be made a Party; he must file a supplemental Bill: the utmost Extent the Court could go, would be to make an Order to secure the Fund in Court (*h*).

Where a Plaintiff in a Creditor's Suit dies after a Decree, the Creditors desiring to prosecute, should move for

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| (<i>a</i>) 7 Ves. 587. | (<i>d</i>) 2 Eq. Ca. Abr. 3. |
| (<i>b</i>) 11 Ves. 602. 1 Madd. | (<i>e</i>) 19 Ves. 585. |
| 529. | (<i>f</i>) 5 Madd. 3. |
| (<i>c</i>) 2 Ves. j. 165. 2 Madd. | (<i>g</i>) 3 Meri. 458. |
| Rep. 183. | (<i>h</i>) 6 Madd. 59. |

Leave to file a supplemental Bill, if the Representative of the deceased Plaintiff does not revive within a certain Time ; and that Service of the Order upon them should be good Service (a).

The Solicitor for a Creditor must prepare a Charge (for the Form, see Title “ Charges and Claims”) which must be copied upon unstamped Paper, and left at the Master’s Office, to whom the Cause is referred ; and an Affidavit (see Title “ Affidavit”) by the Creditor in support of his Charge, must be properly ingrossed and sworn at the Master’s Office, to whom the Cause is referred ; or in his Absence, at the Public Office, and left with the Charge. A Warrant upon leaving must be taken out intitled in the Cause, and underwritten “ G. B. a Bond or simple Contract Creditor, (as the Case is) of E. M. the Testator, has left a Charge of Debt, and an Affidavit in support thereof,” and served upon the respective Clerks in Court for the Parties *interested* in the Distribution of the Assets ; and Warrants “ to proceed on the Charge of G. B. a Creditor, &c.” must be taken out and served successively, and attended until the Charge is disposed of : and the Solicitor should carefully attend to the Charge being marked allowed by the Master, and when the Report is settled, that the Charge is included in the Report or the Schedule.

Creditors for small Sums of Twenty Pounds or Twenty-five Pounds each, or under, are allowed to join in one Charge, but separate Affidavits by each Creditor, in Support of their respective Debts, are required (b).

The Affidavits of Parties in Support of Claims are received in the Master’s Office, merely to give that Assurance that a Debt is due ; but if the Debt be contested, no Attention is given to the Affidavit (c), it must be investigated before the Master, either by a general Set of Interrogatories, for the Examination of every Creditor, who brings in his Claim, or by a distinct Set of Interrogatories, to meet

(a) 4 Madd. 392.

(b) 2 Chit. 14.

(c) 19 Ves. 196.

the Case of a particular Creditor. If a separate Set of Interrogatories are left for the Examination of one Creditor, Doubts formerly were entertained whether these Interrogatories should be settled by the Master, as in the ordinary Course of Proceeding; in which Case the Creditor's Solicitor will be intitled to a Copy of the Interrogatories, and to attend the Master to settle them, and to prepare and put in the Examination: or whether the Defendant is to be examined upon Interrogatories left at the Examiner's Office for that Purpose: it seems to be the generally received Opinion, that the Interrogatories must be settled by the Master as for the Examination of a Party in the Cause; the Creditor by making his Claim, and coming in under the Decree, being considered in Relation to the Cause, a Party to it; and the Practice seems so settled (a). If it should be found necessary to examine any Witnesses, either for or against the Creditor's Claim, such Witnesses must be examined upon Interrogatories filed with the Examiner, or by Commission, in the usual Way. A Creditor, or other Claimant, may take Exceptions to so much of the Master's Report, as relates to his Debt or Claim, and sometimes will be driven to the Necessity of establishing his Claim by the Verdict of a Jury in an Issue or an Action brought against the Executors for that Purpose, by the Direction of the Court: but if an Action is brought against the Executors by a Creditor, without Leave of the Court, the Executors may, after a Decree, obtain an Injunction to restrain his Proceedings at Law, which the Court will order and extend to stay Trial; and if the Action be brought before Bill filed, and the Creditor discontinues, he will be allowed to prove his Costs at Law, in addition to his Debt (b); coming in under the Decree, he is *quasi* a Party; and if he files a new Bill, a Plea of *lis pendens* will hold (c).

(a) 16 Ves. 239.

638. 8 Ves. 520. 2 Cox.

(b) 3 Br. C. C. 23. 1 201.

Br. C. C. 183.

4 Ves.

(c) Red. Ch. Pl. 203.

Simple Contract Creditors have no Interest allowed, though a Trust out of a real Estate be created for Payment of Debts and Legacies, and the Interest of Debts in aid of the personal Estate (*a*): a Work of deservedly high Reputation seems to lay down the Rule generally, that a Claim for Interest must be founded on *Contract, Agreement, or Demand* of Debt (*b*); from whence it seems to follow, that on liquidated Claims Interest is allowed from the Time the Principal becomes due and payable, and that all Debts carrying Interest in their own Nature, have Interest computed upon them as of course (*c*); an Account regularly *stated* and settled carries Interest from the Time of Acknowledgment (*d*); but the Balance of a *mutual* Account does not (*e*): and if an Account be *decreed* it carries no Interest, though the Master's Report be confirmed (*f*). But Interest has been allowed on Agreements in Writing, to pay by Instalments (*g*); and on a Written Contract for a Sum of Money payable on Demand, or on a Day certain, from the Time of the Demand made, or the fixed Time of Payment (*h*): on negotiable Securities, as Bills of Exchange, Notes of Hand payable on a Day certain, or on Demand; from the Time of their becoming payable, or Demand made (*i*). The Words *bearing Interest, or with legal Interest on Demand*, carry Interest from the Date (*k*); and an Award carries Interest from the Time of Demand made (*l*). Interest on a Money Bond, where no Day of Payment is specified in the Condition, is calculated from the Date (*m*); and at Law, where

(*a*) 2 Ves. 364, 587. 4 Ves.
816. 2 Atk. 108.

(*b*) 1 Madd. Ch. 611. 1
Bro. C. C. 239. 5 Ves. 801.
1 Campb. 50.

(*c*) 2 Black. Rep. 761. 3
Wils. 205. 4 Bro. C. C. 318.

(*d*) 2 Ves. 365. 2 Bro. C. C. 3.

(*e*) Dick. 428.

(*f*) 2 Ves. 588.

(*g*) 3 Ves. 133.

(*h*) 5 Ves. 803. 17 Ves.
27. 1 Campb. 50. 3 Campb.
468.

(*i*) Coop. 29.

(*k*) 1 Stark. 452, 507.

(*l*) 3 Campb. 468.

(*m*) 7 T. R. 124.

Goods are to be paid for by Bill, Interest is due from the Time at which the Bill, had it been given, would have become payable; and so where Credit has been given upon a Sale, by a Note in Writing, till a specific Day, Interest is recoverable in the Shape of Damages, from that Period (*a*): and Interest has been recovered on the Deposit, where a Purchase went off from a Defect of Title, calculated from the Time when the Purchase would have been completed (*b*); and it has been said that wherever Interest would be given at Law, in the Shape of Damages, the Party claiming against the Assets in a Court of Equity, would be entitled to what he would have recovered at Law (*c*), contrary to a former Decision of Lord Thurlow. On a Promissory Note, the Rate of Interest given in Damages at Law, has been 5 per Cent. (*d*), and the like Interest has been given on Affirmance by the Court of Exchequer. Under a Contract in Equity to give Promissory Notes, Interest at 5l. per Cent. has been allowed (*e*); but the usual Rate of Interest in the Court of Chancery, is 4l. per Cent.: where Money had been advanced by an Auctioneer upon Goods deposited for Sale, the Court directed Interest to be computed at the latter Rate (*f*). On Debts carrying Interest, Courts of Law in the Shape of Damages, give Interest up to the Day on which final Judgment may be signed (*g*); so in the Court of Chancery, Interest is computed by the Master upon Debts and Securities carrying Interest up to the Date of his Report; but it seems that no Interest subsequent to the Judgment can be recovered at Law, without a fresh Action (*h*): and in like Manner, subsequent Interest from the Confirmation of the Master's Report can be obtained

(*a*) 13 East. 98. 1 Bos. and Pull. 337. 3 Taunt. 157.

(*b*) 1 Moore, 322.

(*c*) 12 Ves. 129. 2 Cox. 420.

(*d*) 8 Ves. 803. 1 Bos. and Pull. 29.

(*e*) 17 Ves. 27. 2 Campb. 472, 480.

(*f*) Hay v. Billing. 10th Dec. 1822.

(*g*) 2 Burr. 1077. 2 T.R. 58.

(*h*) 2 Ves. j. 162. 4 Bro. C. C. 318.

only upon the Hearing for further Directions: if Interest be not given or reserved by the Decree, the Question of Interest has been held to be Matter of re-Hearing, and not to be decided on Petition; but the Point may be raised on further Directions (*a*). When the Master is directed to calculate subsequent Interest, the Course of the Court is to calculate Interest upon those Debts upon which Interest has been calculated before the Report; and only to state the principal Money due on the other Debts, which upon the Face of the Report do not carry Interest (*b*), though *liquidated* by the Report, but not in their Nature carrying Interest (*c*): but on further Directions the Court sometimes gives Interest on Demands not originally carrying Interest; where it appears that Interest was not given, from the Circumstances not being before the Court, until after the Report was made (*d*), or where there has been gross and wilful Misconduct, subsequent to the Decree by Delay in carrying it into Effect (*e*); but it may not be improper to remark, that the mere Ground of the Demand being liquidated by the Report, or any delay which it should appear, that the Party claiming Interest might by due Diligence have prevented, or which the ordinary and usual Course of Proceeding in the Cause has occasioned, the Court has held not sufficient to charge the other Party, or the Estate with subsequent Interest (*f*).

As generally *simple contract* Debts do not carry Interest, under this Head may be comprised, *Notes* payable on a Day *uncertain*, *Book or Shop Debts* (*g*), a *mere Loan* of Money where no Contract to pay Interest is expressed or implied from the Usage of Trade, or other special Circum-

(*a*) 4 Bro. C. C. 318.

(*d*) 2 Ves. j. 162. 1 Bro.

(*b*) 4 Bro. C. C. 318. 2 C. C. 41. Dick. 139.

Cox. 242.

(*e*) 1 Ves. j. 452. 2 Ves.

(*c*) 2 Ves. j. 157. 1 Ja. and j. 36. 471.

W. 187.

(*f*) 2 Ves. j. 169. notis. 716.

(*g*) 3 V 135.

stances (*a*), a Demand for *Money had and received* (*b*), or for *Work and Labour* (*c*); *Arrears* of Maintenance (*d*), or of *Rents and Profits*, *Arrears* of *Jointures* or *Annuities* (*e*); and *Rent Charges*, unless secured by a Clause of re-Entry, or a Penalty upon the grantor (*f*), so *Bail* in Error paying the Debt of the Principal upon Bond: all rank as simple contract Creditors (*g*), though Judgment be obtained at Law. To *increase* a Verdict by *adding Interest*, omitted by a Jury, has been refused (**g*).

The general Rule, that the Master in computing Interest on a bond Debt, shall not go beyond the Penalty, is clearly established, and firmly adhered to (*h*); but it should seem there are Cases where the Rule bends to Circumstances (*i*): if the Party has been restrained by Injunction from proceeding at Law (*k*), or a Creditor by *Elegit* has been called upon to account in Equity; or a Judgment Creditor, a Trustee in Possession under the Will of the Debtor, applying all the Rents in discharge of other Debts, has not retained any Part towards his own Debt (*l*); or where Advantage has been made of the Money; or if the Bond be a collateral Security (*m*); and at Law in an Action upon a Judgment recovered on a Bond, Interest has been given in the Shape of Damages beyond the Penalty (*n*); but the Rule is so obstinate and inflexible, that it would require a very strong Case, and very special Circumstances to induce the Court to break through it. If a Bond is secured by a

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| (<i>a</i>) 15 East. 223. | 489. 1 Ves. j. 451. 5 Ves. |
| (<i>b</i>) 1 Bos. and Pull. 306. | 331. 17 Ves. 106. |
| 2 Bos. and Pull. 467. | (<i>i</i>) 3 Ves. 557. 6 Ves. 411. |
| (<i>c</i>) 1 Hen. Bl. 303. | 9 Ves. 41. |
| (<i>d</i>) 14 Ves. 516. | (<i>k</i>) 1 Vern. 349. Stow. P. C. |
| (<i>e</i>) 17 Ves. 106. | 15. |
| (<i>f</i>) 2 P. Wms. 163. 2 Atk. | (<i>l</i>) 1 Ball. and Beat. 238. |
| 211, 411. 3 Atk. 579. | (<i>m</i>) 14 Ves. 460. pl. 3. 2 |
| (<i>g</i>) 2 Anstr. 558. 2 Ves. 716. | Bro. P. C. 251. 383. |
| (<i>*g</i>) 1 Do. and. Ry. 16. | (<i>n</i>) 1 East. 436. 2 Term. |
| (<i>h</i>) Dougl. 49. 3 Bro C.C. | Rep. 388. |

Judgment for the Penalty, Interest is computed upon the Principal secured by the Bond, to the Date of the Report, but not so as to exceed the Penalty (a); and a Creditor having Securities by Bond and Mortgage, if he sues upon the former, the Master cannot allow Interest beyond the Penalty; but as the same Sum is secured by a *Penalty*, and a *specific Lien*; and the latter is to secure Payment not of the Bond, but of the Sum for which it was given with Interest, the Creditor may resort to either, and he may recover on the Mortgage, Interest beyond the Penalty of the Bond (b), though the Mortgage be as a Surety only: upon a single Bond, for securing a Passage to India, Interest is not recoverable, unless specially reserved (c). Interest is not allowed on Judgments at Law, unless founded on a Debt in its Nature carrying Interest, or in a Penalty (d), and when Interest is allowed, the Computation is made upon the original Debt to the Date of the Report. Interest is not allowed on Judgments of Assets *quando acciderint* (e), nor on Judgments, founded either on the Judgment of a foreign Court (f), or on simple contract Debts. Interest is not allowed upon Interest of a Bond-Debt in a Report (g), nor upon the Rents and Profits of an Estate (h). Upon a Bond executed in Ireland for a Debt contracted in England, *Irish* Interest is computed (i). *Compound Interest* is allowed where there are regular Accounts settled from Time to Time in all Cases, except that of a Mortgage; and in Merchants' Accounts always, on the Ground of an original Contract of which the settling Accounts in that Way is Evidence (k); or if there be a Contract express or implied, from the Nature of the Dealings between the Parties (l):

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| (a) 3 Ves. 557. | (g) 1 Ves. j. 99. 1 Ja. and |
| (b) 17 Ves. 106. | Wa. 39. |
| (c) 1 Bos. and Pull. 337, | (h) For. 2 Flad. Dig. 476. |
| (d) 2 Fonbl. Eq. 429. 2 | (i) 2 Atk. 382. |
| Ves. j. 157. 4 Bro. C. C. 318. | (k) 3 Bro. C. C. 410. |
| (e) 2 Ves. 176. | (l) 2 Ves. j. 15. 9 Ves. 223. |
| (f) 4 Campb. 180. 1 Stark. 219. | |

but it seems decided as between Mortgagor and Mortgagee, that Interest cannot be turned into Principal, without the Privity of the Mortgagor (*a*), and unless there be some *Writing signed* by the Parties (*b*).

Claims of Legatees and Next of Kin coming in under a Decree: when brought into the Master's Office, the Course of Proceeding is similar to the Proceeding upon Charges by Creditors; the *Formulae* will be found in another Part of this Work, under the Titles of *Charges and Claims*. Under this Head it may be useful to observe, that Legacies are not within the Statute of Limitations; they are not barred by Length of Time; they may have been kept back on account of all the Debts not being paid: but the Court acting upon a consistent Principle, after a Lapse of Time and Acquiescence, will presume Payment, which unless repelled by Evidence of particular Circumstances will be conclusive (*c*). The Presumption has been held to prevail after a Lapse of Forty-four Years without Demand (*d*): so after Forty Years (*e*), and even Twenty-five Years (*f*); but it should seem that where the Presumption has been admitted, the Circumstances have been such, as to lay a Ground for the Presumption (*g*). In a recent Instance, the Ecclesiastical Court decreed Payment of a Legacy after a Lapse of Twenty-six Years, though the Length of Time had been irregularly and loosely accounted for (*h*). If a Legatee has been kept in Ignorance of his Right, it should seem the Presumption cannot be raised (*i*); but where a Person has not been heard of for a great Length of Time, Twenty-three

(*a*) 4 Ves. 128.

(*b*) 1 P. Wms. 653.

(*c*) 2 Atk. 251. 1 Fonbl. Eq. 332. 2 Ves. j. 11. 280. 571. Beam. Pl. 168.

(*d*) 2 Vern. 20. 2 Ves. j. 2.

(*e*) 2 Ves. j. 11. 4 Bro. C. C. j. 115.

(*f*) 4 Bro. C. C. 210.

(*g*) 3 Bro. C. C. 96.

(*h*) Ducket and Wife v. Clarke, Arches Court, 1822. MSS.

(*i*) Sol. Ca. Ch. 2. 2 Ves.

Years (*a*), or even Fourteen Years (*b*), he will be taken to be dead: an Annuity unclaimed for a great Length of Time, has been presumed to be satisfied (*c*); but the short Period of Five or Six Years have been held not sufficient to raise the Presumption (*d*). If a Doubt be entertained, as to a Figure in the Gift of a Legacy, whether it be a Three or an Eight, a Reference will not be made to a Master (*e*); the Court will direct an Issue (*f*).

A Husband claiming a Legacy *Jure Uxoris*, if he has not made an adequate Settlement before Marriage (*g*), will not be allowed to obtain his Wife's Fortune, without making a Provision (*h*). An inadequate Settlement voluntarily made after Marriage has been held not to vary the Rule (*i*); and as the Spiritual Court cannot enforce a Settlement, the Court of Chancery will restrain by Injunction, Proceedings by the Husband there (*k*); for the like Reason, an Action at Law cannot be maintained for a pecuniary Legacy (*l*), nor will her Consent to the Disposal of her Fortune be taken, until the Subject is ascertained (*m*): all Persons claiming through or under the Husband by Operation of Law or otherwise, are within the Rule; Assignees take subject to the Wife's Equity, and are bound to make a proper Settlement (*n*), which is usually one Fifth of the Dividends and Interest upon the Husband, and the Residue upon the Wife for her sole and separate Use during their joint Lives, with a Power by the Wife to give another Fifth to the Husband by Will; the Residue subject to Mainte-

(*a*) 13 Ves. 362.

(*i*) 2 Atk. 448.

(*b*) 6 Ves. 605. 4 Barn. and Ald. 433.

(*k*) 1 Atk. 516. 2 Atk. 420. Pre. Ch. 548.

(*c*) 2 Atk. 71.

(*l*) 5 Term. R. 690. Poake 73.

(*d*) 13 Ves. 362.

(*m*) 8 Ves. 164. 12 Ves. 174. 1 Anstr. 93.

(*e*) 1 P. Wms. 421.

(*f*) 4 Ves. 770.

(*g*) 3 Atk. 400.

(*n*) 3 P. Wms. 382 2 Ves.

(*h*) 2 P. Wms. 639. 3 P. Wms. 205. 13 Ves. 6.

680. 3 Ves. 421. 11 Ves. 101.

nance to accumulate; and with the Principal to go to the Children at Twenty-one, or Marriage; or if only one Child, to that Child; and in the Event of a second Marriage, a Power to the Wife of appointing to each Child by the first Marriage (*a*): if no Children, and the Husband survives: in Default of Appointment, to her Next of Kin, exclusive of the Husband (*b*). Sums under 200l. or 10l. Annual Payment, seem to form an Exception (*c*); but wherever a Woman is or has been married, a positive Affidavit, that the Legacy has not been in any Manner settled, is required before Payment will be directed by the Court (*d*). A Legacy to a Married Woman, *for her own Use and Benefit*, does not give her a separate Estate (*e*).

A Legacy to an *Infant* or *Absentee*, under the Provisions of the Legacy Act (*f*), which applies to Infancy or Absence of a Legatee beyond Sea, may be paid into Court by Order to be obtained upon a Motion with Notice or Petition, and laid out and invested in Bank Annuities; and the Infant when he comes of Age, or the absent Legatee, may by Petition obtain Payment. The Court has declared (*g*), that in future it would not give Costs of a Suit to secure a Legacy out of a Testator's Estate, as the Executor could safely act under that Statute. Payment of the Infant's Legacy to his Father, is not valid (*h*); but if the Will gives it to him to be divided between himself and Family, it may be paid to the Father (*i*). Where a Legatee is abroad, Payment under a *general Power* of Attorney, executed by him, though not authorizing Payment of the Legacy specifically, has been held regular (*k*).

(*a*) 5 Ves. 398.

(*b*) 8 Ves. 74.

(*c*) Ord. Can. Be. Ed.
464. 5 Ves. 742. n. 1. Ja. and
Wa. 69,

(*d*) 2 Cox. 157.

(*e*) 5 Madd. 491.

(*f*) 36 Geo. 3. c. 52. s. 32.

37 Geo. 3. c. 135.

(*g*) 4 Ves. 630.

(*h*) 1 P. Wms. 285. 1 Eq.
Ca. Abr. 300. 3 Bro. C.C. 97.

(*i*) 3 Bro. C. C. 186. 8 Ves.
142.

(*k*) 2 Cox. 390.

Specific Legatees are paid *in toto*, and not in Average: on a Deficiency of Assets to pay Legacies, they are not intitled to Contribution from the pecuniary Legatees, and therefore pay none to them (a); and upon a Deficiency to pay both, the specific Legatee takes his whole Legacy, but he abates in proportion with other specific Legatees; a specific Legacy vests *immediately* upon the Death of the Testator, and carries Interest from that Period, as in the Instance of Stock specifically given (b). A *demonstrative Legacy* differs from other general pecuniary Legacies, in being payable out of a particular Fund; but it is so far specific as not to abate (c): a *Donatio causa Mortis* must be made in the *last Sickness*, and requires an actual Delivery of the Gift (d).

Here we should remark, as to *Interest upon Legacies*, the general Rule of the Court; that where no Rate of Interest is specified by the Will, Interest is to be computed upon a *pecuniary Legacy*, at 4l. per Cent, only from the End of the Year, after the Death of the Testator, whether charged on real or personal Estate, or upon Property productive or unproductive (e), although the Fund produces 5l. per Cent; and the Interest will not be increased by the Effect of Appropriation (f): generally a Legacy payable *in Future* does not carry Interest before the Time of Payment, and although it be given to an Infant (g): but a Legacy to a *legitimate* Child, not otherwise provided for (h), the Case of a Residue, or special Circumstances of an Intention to give Interest, to which may be added a Legacy

(a) 1 P. Wms. 403. 3 P. Wms. 385. 19 Ves. 645.

(b) 4 Ves. 175, 751, 6 Ves. 345. 6 Madd. 345.

(c) 2 Ves. j. 640,

d) 3 P. Wms. 357, 2 Ves. 462. 1 Ves. j. 546.

(e) 1 Ves. 408. 7 Ves. 97. 8 Ves. 410. 10 Ves. 13. 3

Madd. 61. 1 Scho. and Lefr. 11.

(f) 2 P. Wms. 343. 2 Atk. 109. 6 Ves. 520. 1 Ja. & W. 137

(g) 4 Ves. 1.

(h) 3 Ves. 13, 286. 3 Atk. 109, 216. 1 Cox. 241.

in Satisfaction of a Debt, are Exceptions; but the latter must be payable *immediately* on the Death of the Testator, from which Period Interest is always given by the Court (a): and it should be observed, that Legacies carry Interest until actual Payment, whatever Time may elapse (b); but if it can be clearly shewn, that there are no Debts, the Court will distribute the Fund before the Twelve Months (c); unless some other Period is fixed by the Will (d). The *Rate of Interest* upon Legacies seems to be regulated by the Value of the Currency of the Country to which the Testator belonged, the Locality of the Property, or where the Payment is to be made (e), and the Legatees reside (f): a Legacy by a Testator living in *Ireland* to be paid in England, has been held to carry 4l. per Cent and not *Irish* Interest (g); so a Testator living in the *West Indies* describing the Legacy as *sterling* Money, Interest has been given at 4l. per Cent (h); but where Legacies were given in *Jamaica Currency*, and the Fund carrying Jamaica Interest kept there, Jamaica Interest was allowed (i); but not where the Assets and Executors were in both Countries, and the Legatees are living here though given in Jamaica Currency (k); so under *Indian* Wills, if to be paid in England, *Indian* Interest is not allowed (l); by a recent Decision, a Legacy in a foreign Country and Coin, as *Sicca Rupees*, by a Will in *India*, if paid by Remittance to this Country, must be paid according to the current value of the Rupee in *India*, without Regard to Exchange or Expense of Remittance (m).

(a) 3 Atk. 98. 1 Bro. C. C. 296.

(b) 13 Ves. 333

(c) 10 Ves. 13.

(d) 1 Ves. j. 367. 7 Ves. 524. 8 Ves. 413.

(e) 1 P. Wms. 696. 2 P. Wms. 80. 2 Atk. 465.

(f) 1 Ves. 427. 10 Ves 330. 3 Bro. C. C. 38, 50.

(g) 3 Bro. C. C. 53.

(h) 3 Bro. C. C. 50.

(i) 5 Ves. 199. 9 Ves. 267. 1 Eq. Ca. Abr. 289.

(k) 10 Ves. 330.

(l) Ibid.

(m) 16 Ves. 461.

In taking the Executorship Accounts, it should be further observed, that if a Legatee die in the Life-time of the Testator, the Legacy is *lapsed*, unless it be a joint Legacy (*a*), or a Tenancy in common with Survivorship (*b*), though Representatives are expressed in the Gift (*c*); and the same Rule holds as to a Devisee of real Estate, where he dies *Vita Testatoris* (*d*); but if Interest be given on a Legacy, however small (*e*), or as a Provision for Maintenance, if equal in Amount to the Interest (*f*), the Legacy is vested, unless a contrary Intention is shewn by the Will (*g*): where a Legacy is given to one, and if he die before Twenty-one, over to an other, and the first Legatee die before Twenty-one, in the Testator's Life-time, the Legacy goes over and is not lapsed (*h*); and so, where personal Property is given to one for Life, and after his Decease to another, this vests in the latter, though he die in the Life-time of the first Taker; and his Representatives are intitled to the Legacy when it becomes due (*i*). Where Money is given to be paid at a *future Time* out of a real Estate, and the Legatee dies before the Time, it sinks into the Estate (*k*); and so where the Legacy is charged on a real Estate *to be purchased* with the Residue of a personal Estate (*l*); and whether the Gift be by a Parent (*m*), or a Stranger (*n*) charged in the first Instance upon Land, or as auxiliary to the personal Estate (*o*), though with Interest (*p*); if the Legatee

(*a*) 3 P. Wms. 113. Ambl. 36, 175.

(*b*) 2 Vern. 207.

(*c*) 1 P. Wms. 83. 1 Bro. C. C. 84.

(*d*) 2 Cbx. 121.

(*e*) 1 Ves. 118. 6 Ves. 249, 2 Bro. C. C. 305.

(*f*) 2 Bro. C. C. 3. 105. 416.

(*g*) 3 Atk. 645. 1 Ves. 118.

(*h*) 1 P. Wms. 343.

(*i*) 1 Bro. C. C. 119, 123, 181, 228. 13 Ves. 108. 15 Ves. 122.

(*k*) 1 Atk. 503, 512. 3 P. Wms. 138.

(*l*) 2 Cox. 247.

(*m*) 3 Bro. C. C. 110.

(*n*) 1 Atk. 485.

(*o*) 2 P. Wms. 612.

(*p*) 1 Bro. C. C. 106. n.

die before it is payable, the Legacy sinks into the Land, as well in the Case of an Hæres factus as Hæres natus (*a*), and the Distinction seems to hold where the Legacy is charged on both personal and real Estate, if the former is sufficient, the Legacy is payable thereout (*b*), or if only partly so, as much as it will extend to pay, will be vested and go to Representatives (*c*).

It may be useful in this Place to observe that a pecuniary Legacy is a *Satisfaction* of a Debt owing to a Legatee, provided it be equal to (*d*), or greater than the Debt (*e*); but any trifling Circumstance will take it out of the Rule: on the other Hand, if the Legacy be less, it is not even *pro tanto* a Satisfaction (*f*), neither is a specific Bequest, unless accepted as such (*g*); nor if the Debt due to the Legatee be unliquidated, or upon an *open or running Account*, or contracted since making the Will (*h*): a Legacy has been held not to be an Extinguishment of a negotiable Security (*i*): to satisfy a Debt, the Legacy must be payable *immediately* on the Testator's Death (*k*); if the Debt be payable one Month after the Death, and the Legacy six, it is not a Satisfaction (*l*); a Legacy payable on a *Contingency* is not a Satisfaction (*m*).

It might be improper to pass over without Notice, the Duty payable upon Legacies; it has been held that a Legacy paid into Court and invested previous the 48 Geo. 3.

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| (<i>a</i>) 2 P. Wms. 277. | (<i>g</i>) 1 Cox. 49. |
| (<i>b</i>) 3 Atk. 69. | (<i>h</i>) 1 P. Wms. 299. 2 P. |
| (<i>c</i>) 2 P. Wms. 278, 613. 3 | Wms. 342. 1 Ves. 324. 1 |
| Atk. 320. | Esp. 187. |
| (<i>d</i>) 2 Vern. 498. Mose. 8. | (<i>i</i>) 3 Ves. 564. |
| (<i>e</i>) 11 Ves. 544. 2 P. | (<i>k</i>) 3 Atk. 98. 1 Bro. C. C. |
| Wms. 132. 1 Ves. 263. 3 | 296. |
| Ves. 544. | (<i>l</i>) 2 P. Wms. 552. 1 Bro. |
| (<i>f</i>) 2 P. Wms. 616, Mose. | C. C. 29. |
| 295. | (<i>m</i>) 2 Atk. 301. |

is a sufficient Appropriation, and not liable to the Duty(*a*); and a Legacy directed to be paid *without Deduction*, throws the Legacy Duty upon the Executors(*b*); and an Exemption from Duty has been *considered* as an Augmentation of the Legacy, and payable out of a specific Fund(*c*), and so a Substitution, or a subsequent Addition to a Legacy is attended with the Incidents to the original Legacy(*d*): and recently, where the Residue was given absolutely to the Testator's Daughter and her Husband a Stranger in Blood, the Wife taking a direct and definite Interest as to a Moiety, the Duty of One per Cent. only was held to be payable by her, and as to the other Moiety by the Husband, Ten per Cent (*e*).

Lastly, as to the Costs of proving Debts and Legacies by Persons *not Parties* to the Suit, the general Rule is, that *Creditors, Legatees, and Next of Kin* going in before the Master, to prove their Debts and Claim their Legacies and Shares, 'as such pay their own Costs of so doing, and are allowed none; but if after establishing their Debts and Claims, they are permitted to mix in the Cause, as if they had been Parties, then in respect of such Proceedings, they may be intitled to their Costs (*f*); but we are told in a recent Case, that although a Creditor who proves his Debt generally has no Costs, yet if his Proof be beneficial to the Estate, as for Instance, where he saves by it the Expences of a Suit, and there are extraordinary Costs, the Court will give them upon Petition (*g*): and a Legatee agreeing after a Decree for administering the Estate in Chancery, obtained by another Legatee, to stop Proceedings in a Suit previously instituted by him in the Exchequer, has been allowed his Costs up to the Time of his having Notice of

(*a*) 2 Meri. 45. 3 Meri. 154.

(*b*) 1 Swanst. 562.

(*c*) 7 Price. 241.

(*d*) 6 Madd. 30. 3 Bro.

C. C. 233. 1 Ves. j. 279.

(*e*) 8 Price, 30.

(*f*) 10 Ves. 355. 6 Madd.

110.

(*g*) 6 Madd. 91.

such Decree (a); but a Creditor proceeding at Law against an Executor after Notice of a Decree, is considered so far guilty of a Contempt, that upon an Application to restrain him, he will not be allowed the Costs of the further Proceedings at Law, nor the Costs of the Application (b); in a Creditor's Suit, the Decree directs that such Creditors as shall come in and prove their Debts, before they are admitted as such, are to contribute a proportion of the Expences of the Suit, to be settled by the Master; but in respect to Contribution, it should be remarked, if the Plaintiff's Solicitor neglects to pursue the usual Directions for Contribution, and a Creditor coming in under the Decree, is allowed to prove his Debt, the Plaintiff waives all Claim to Contribution afterwards: where Creditors had come in and proved their Debts, and to obtain Payment, applied to the Plaintiff's Solicitor to attend at the Accountant-General's Office with the Report and Proceedings, tendering a Fee of Six Shillings and Eight-pence for his Attendance, which he refused, insisting upon One Shilling in the Pound on their respective Debts, as their Proportion and Contribution towards the Expences and extra Costs of the Suit, and also Six Shillings and Eight-pence for his Attendance. Upon Application to the Court that the Solicitor might be ordered to attend, the Vice-Chancellor decided that the Solicitor had no right to the Deduction claimed, and that he was obliged to attend at the Accountant General's Office with the Report, upon the Application of every Creditor upon Payment of the usual Fee of Six Shillings and Eight-pence only; and his Honour made an Order to that Effect, and visited the Solicitor with Payment of the Costs of the Motion to such Creditors who had *tendered* the Fee of Six Shillings and Eight-pence, and without Costs as to those who had not (c). *Specific Legatees* seem to enjoy the Benefit of the general Rule, with the Exception of Costs occasioned

(a) 1 Jac. and Wa. 229.

(c) 5 Madd. 447.

(b) 3 Madd. 456.

by Enquiries respecting their specific Legacies: the specific Legatee is only intitled to *contribute* as far as the Costs of Enquiry, as to his specific Legacy (*b*). In Conclusion, we should remark, that the Costs of Contribution in a Creditor's Suit, have by Direction of His Honour the Vice-Chancellor, been brought under the Consideration of the Lord Chancellor, and that the Matter is sub Judice (*c*).

Where the Maintenance of Infants is directed, and the Master is to enquire what is proper to be allowed for that Purpose; and it is necessary to obtain such Allowance before the Master has made his General Report in the Cause; if there be no Direction in the Decree for the Master to make a *separate Report*, an Order must be obtained that the Master may be at Liberty to make a separate Report of the personal Estate, &c. and what is proper to be allowed for the Maintenance of the Infants. A Notice must be given of the Motion (the Form see under Title "Notices of Motion"); and an Affidavit of the Service thereof on the respective Clerks in Court, made and filed, and an Office-Copy obtained to read in Court, on the Motion, in Case the Defendants should not appear. A Brief should be prepared, stating shortly the Manner in which the Plaintiffs the Infants, for whom Maintenance is required, are intitled; and to what Property in the Suit, or otherwise; and it should include a short Statement of the Purport of the Decree. The Fee to Counsel should be according to the Length of the Brief; and the Court must be attended on the Motion, with the proper Papers to be read in Support of the Application. If the Court makes the Order, the Brief must be left with the Register, who will draw up the Order, which must be passed and entered; and if the Defendants did not appear on the Motion, it should be served on their Clerks in Court: if they appeared it is not necessary to serve the Order; but a fair practiser usually serves the Order, whether the adverse Parties appeared or not.

(*a*) 5 Ves. 464. 1 Swanst.
566. Beam. Costs, 17.

(*b*) Turner v. Turner, 20th
Nov. 1823. MSS.

The Order usually directs the Master *to enquire and state whether A. B. the Father of the Infants was, at the Death of the Testator, and now is of ability to maintain and educate the Plaintiffs, his Infant Children, suitable to their Fortunes and Situation in Life*; and if he should find *he was not*, at the Death of the Testator able to do so, then he is to enquire and state *who has maintained and educated the said Infants since the Testator's Death*, and what has been *properly expended, or ought to be allowed on that Account*, and out of what Fund the same ought to be paid; and if he should find that the said A. B. the Infants' Father *is not now of Ability to maintain* and educate his Infant Children in Manner aforesaid, the Master is to consider and state *what will be proper to be allowed* for their future Maintenance and Education; and *out of what Fund* the same ought to be paid: and he is also to make a separate Report as to such Maintenance and Education, &c.

The Order must be left at the Master's Office; and the Situation of the Infants, their Ages, the Property to which they are intitled, and what Sums of Money have been actually expended, and in what Manner the same has been laid out and applied; and from and to what period of Time the Allowance for Maintenance is claimed, must be brought before the Master, for his Consideration, in the Shape of a *State of Facts*, and generally a *Proposal for future Maintenance*, founded upon the State of Facts, is subjoined thereto.

The Extent of the Allowance is regulated by the Age, Fortune and the Manner in which the Infants have been previously and are to be educated in future. If the Facts as stated, have not been verified by any Proof in the Cause; such as the Examination, &c., they should be supported by Affidavit; and upon leaving the State of Facts and Proposal Warrants must be taken out and served, underwritten "The Plaintiffs have left a State of Facts and Proposal, for the Maintenance of the Plaintiffs the Infants," and successive Warrants to proceed, taken out and attended.

The Master having prepared a Draught of *his separate Report*, a Copy thereof must be taken, and carefully perused; and such Alterations made therein as may appear to be necessary, should be represented to the Master, on attending the Warrant to settle the Draught: a Warrant must be taken out and served, underwritten “The Master has prepared a Draught of his separate Report.” Other Warrants must be taken out to proceed on and settle the Draught, all of which must be duly served on the Clerks in Court for the adverse Parties. When the Draught of the Report is settled, the Master’s Clerk will transcribe it: and a Warrant must then be taken out, and underwritten—“At which Time the Master will sign his separate Report:” the Report must be filed in the Report Office, and an Office-Copy taken. To carry these Proceedings into Effect, a Petition should be presented, stating the Decree, Order, and Report, praying that the Report may be confirmed, and that the Allowance certified therein may be ordered for the Maintenance and Education of the Infants.

It should not escape the Attention of the junior Practiser, that it has been held Irregular to confirm a separate Report of Maintenance *on Motion (a)*. The Application would be at the Risk of Costs, and it is decidedly Irregular to set down the Cause for *further Directions*, on the *separate Report*; a Cause so set down has been struck out of the general Paper of Causes, with Costs, the Vice-Chancellor observing, that any Order upon a separate Report must be made upon Petition *(b)*; and as no Exceptions lie to a Report of Maintenance *(c)*, whatever Objection there may be to the Report, it must be brought before the Court by a Counter-Petition, set down for hearing at the same Time, when the original Petition for confirming the Report comes on; unless upon the Face of the Report, there appear sufficient Ground to raise the Question; but it should be

(a) 5 Ves. 199.

(b) 3 Madd. 430.

(c) 1 Bro. C. C. 577.

observed, that all the Circumstances must appear on the Report, and no matter *dehors* will be allowed (a).

The Petition must be intitled in the Cause, stating the Title of the Infants to the Property out of which the Allowance for Maintenance is prayed, and so much of the Decree and Report as relates to the Matter in Question. (See Title "*Petitions*.") It should be presented to the Lord Chancellor or Master of the Rolls, in Time to be heard on the last Saturday in Term, or Petition-Day after Term. The Lord Chancellor appoints a Day for hearing Petitions presented to him, in the Sittings both before and after the Term. The Master of the Rolls hears Petitions presented to him, at the Rolls the Evening before the first, and the Morning after the last Day of Term: and he usually appoints another Day or two for the like Purpose, between the Seals after Term. A close Copy of the Petition must be left with the Petition when it is presented. The Petition being answered, will be set down in the Paper of Petitions, and be heard in its turn: and distinct Copies of the Petition with the Order for Attendance thereon, must be made and served on the Clerks in Court for the adverse Parties, two clear Days before the Day appointed for hearing Petitions, and an Affidavit of Service made and filed, and an Office-Copy taken to read in Court, if the other Side should not appear on the Hearing. A Brief-Copy of the Petition must be given to Counsel, and the Hearing should be attended, with the Decree, Report, and other Papers necessary to support the Petition; and if the Sum allowed for Maintenance is to be paid out of Money in the Accountant General's Hands, his Certificate of the Money in the Cause must be produced and read, and it should be bespoke at his Office some Days previous to the Petition coming on: the Order on the Petition will be made as prayed, unless the Court should be of Opinion that the Allowance is too great, or some Informality

(a) 1 Ja. and Wa. 476. 6 Ves. 226.

appears. The original Petition must be left with the Registrar of the Day, and the Order drawn up, passed and entered, and left at the Accountant-General's Office, and the requisite Instructions given for such Transfers or Accounts as the Order directs. If the Order directs a Sale of any Part of the Stock, a Certificate thereof must be obtained from the Registrar, which upon producing the Order and Report he will sign; and it must be left with the Accountant-General, without which he cannot make a Sale. If any Monies are directed to be carried over to a particular Account, the Order must be left with the Accountant-General, and he will carry the same over in his Books, and give a Certificate thereof, which his Clerk usually files in the Report Office, and takes an Office-Copy of, and delivers to the Solicitor, and it is paid for according to its length. For a Sale of Stock, and for every other Act done by the Accountant-General pursuant to an Order, a Certificate is given and filed at the Report Office (a).

Having detailed the Course of Practice in proceeding upon a Reference for Maintenance, some useful Observations upon Maintenance generally, may not be unacceptable.

Maintenance for Infants is governed by Circumstances, and decided upon the Specialties of the Application; the Establishment of the Father, and the Expectancies of the Children.

A Parent is bound by nature to support his Child, unless he is totally incapable (b), or from having a numerous Family, borders upon Necessity (c); the Application of the Interest of a contingent Legacy towards the Maintenance of a Child, has been allowed only in Cases where, from the Poverty of the Parent, the Infant is in Danger of perishing for Want (d); but where there is an express Direction for

(a) For the Practice at the Accountant-General's Office, see Hands' Chanc. a very useful and correct Work.

(b) 1 Atk. 515.

(d) 3 Atk. 123.

(c) 2 Atk. 330. 3 Atk. 60.

VOL. I.

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Maintenance by the Will, the Court will decree an Allowance without regard to the Ability of the Father (a).

To entitle the Father of an Infant Legatee to Maintenance, the Rule is not laid down, upon the Father's absolute Insolvency only, but Maintenance is given, when the Father is in such Circumstances as not to be able to give the Child such an Education as is suitable to the Fortune which he expects (b). And more modern Determinations seem to have considered Maintenance upon a much more extensive Principle: where an Application was made to confirm a Report of Maintenance allowing Fourteen Hundred a Year to a Father, who had an Estate of Six Thousand, the Infants, six in number, being entitled to an Estate of Eight Thousand Six Hundred annual Value; *Sir William Grant, M. R.* in confirming the Report observed, "that it would be very loose to consider any particular Income, as enabling a Father to maintain his Children: To a Nobleman, Six Thousand a Year certainly would not be thought enough to exclude him from requiring some Maintenance out of his Children's Fortunes, to a private Gentleman it may be otherwise; on the outside, it *here* would seem enough: at the same Time, the Expences of the Father's Establishment, and his Children's Expectations, are to be looked to: it would be a harsh Thing for the Court to oblige the Father to put down his Establishment in any Part to educate his Children, when they have large Incomes of their own (c)."

And whether Maintenance shall be allowed during the Life of the Father, depends upon the Circumstances of the Case (d); but wherever Maintenance is allowed, it is always paid out of the Interest of the Infant's Fortune (e); and there seems to be no Instance of its being deducted out of a Legacy left by a Father to a

(a) 4 Bro. C. C. 223. 3 Ves.
730.

(b) 1 Cox. 80.

(c) 1 Coop. 52.

(d) 1 Atk. 515.

(e) 2 Sch. and Lefr. 35.

Child, or out of a Debt due from the Father to the Testator, though insisted on by Creditors (*a*). A Father cannot apply a Legacy left by a Relation to his Child in his Maintenance, nor can he place him out Apprentice with the Money arising from a Legacy (*b*). Nor can an Executor justify advancing a Legacy payable at twenty-one to an Infant, or to his Father, except, perhaps, for express Necessaries (*c*); though there are Instances where Trustees have been allowed an Apprentice Fee paid for an Infant out of a Legacy (*d*). Maintenance will not be allowed in general for *Time past*, though under Circumstances it has been allowed (*e*).

Where the Father has been reported not of Ability, Maintenance has been allowed, but only from the Date of the Report (*f*). *Lord Thurlow*, in refusing an Application for Maintenance for *the Time past*, observed, that a Direction to Trustees to apply the Produce of a Fund in the Maintenance of Infants, was construed to mean, *if there is no Maintenance due to them in Law*, but not otherwise: that while the Father was living, *Maintenance is in Law due from him*; that the constant and proper Rule of the Court is, not to make any Allowance with *retrospect* to what the Father has paid without the Authority of the Court; that the Payment by the Trustees was in the same Situation: if the Will had given the Dividends to the Father for the Maintenance of the Children, it would have amounted to a Legacy of the Dividends to the Father, which he would have been entitled to, though he had not spent half of it in his Children's Maintenance (*g*). But upon a recent Application, where Power was given to Trustees to apply Dividends for Maintenance, with the Approbation of the Parents; and by the Death of the Trustees,

(*a*) 3 Atk. 123.

(*b*) 21 Atk. 399.

(*c*) 3 Br. C. C. 178.

(*d*) 2 Vern. 137.

(*e*) 1 Bro. C. C. 386. 2 Bro.

C. C. 231. 14 Ves. 499. 6

Ves. 425, 454. 9 Ves. 285.

(*f*) 1 Br. C. C. 387. 4 Bl.

C. C. 226.

(*g*) 2 Cox, 223.

or their not acting, that Power had not been exercised ; *Lord Eldon* directed an Enquiry, whether it would have been reasonable and proper in the Trustees to apply any, and what Part of the Dividends, having regard to the Situation, Circumstances, and Ability of the Father, and the Fortunes of the Children, and allowed Maintenance for the *Time past (a)*.

Maintenance is allowed in Cases where the Fund being given to the Children, with Survivorship amongst them, the Interests and the Chance of taking the whole as Survivor is equal, and no other Person interested (*b*). Where Children born, or to be born, have a common Interest in a Fund, the Income of the Fund, if necessary, may be applied toward their Maintenance (*c*) ; but where the Residue was bequeathed to Infants, with Survivorship amongst them, in the Event of Death under twenty-one, with a Limitation over, upon Death to a Sister, who had no other Interest in the Fund, though a distinct Legatee under the Will, there being a Limitation over, the Court refused to allow Maintenance (*d*). Maintenance out of Interest of a Legacy to Grand-Children, *when* the youngest *should attain twenty-one*, has been refused (*e*). In the Case of Legacies by a Grandfather to a Grand-Child, the Court has refused Maintenance out of a Fund *not vested* (*f*), and although the Father was not of Ability to maintain them (*g*). But if the Devisee over *consents*, Maintenance will be allowed against a Direction for Accumulation, where it is for the Benefit of the Infants, and the Chance of Survivorship is equal ; and no other Interest to take effect upon a Contingency will be defeated (*h*) : as in the Case of a residuary Bequest to a large Amount, in favour of Infant Grand-

(*a*) 9 Ves. 285. 14 Ves. 499.

(*b*) 5 Ves. 197. 11 Ves. 48.

604. 13 Ves. 25.

(*c*) 4 Madd. 280.

(*d*) 10 Ves. 48.

(*e*) 11 Ves. 48.

(*f*) 1 Cox 80.

(*g*) 12 Ves. 20. 2 Atk. 330.

(*h*) 11 Ves. 48. 14 Ves. 202.

Children, payable at twenty-one, or Marriage, with Survivorship, the Interest to accumulate and be paid with the Capital, and in case of Death of all before the Time of Payment, over to their Mother absolutely ; the Father's Income, though considerable, bearing no Proportion to the Fortune bequeathed, and there being several Children, the Court directed Maintenance, taking the *Consent* of the Mother, to whom the Property was *given over* (a). And where there was a Direction in a Will, to apply so much Interest as might be *necessary* towards the Maintenance and Education of Infants, upon the Decease of their respective Mothers, the Residue to accumulate for them all, the Allowance for Maintenance was confined to so much as should be *actually necessary*, their Father having left them considerable Property, with a Provision for Maintenance (b). Maintenance has been allowed to Grand-Children out of the Fortune bequeathed by their Grandfather, though *not directed* by the Will; the Parents not being of Ability to maintain them (c); and so if given by a Parent to a Child, payable at a *future Day* (d). And where a Devise was to an Infant Grandson at twenty-one, with Accumulation in the mean Time, and similar Limitations to his Sisters, in the Event of his Death under Age; their Father being dead, having left all his Property to his Wife, who married a *Man in mean and low Circumstances*; Maintenance was *decreed without Inquiry* whether it was for the Benefit of the Infants, of which the Court will judge (e). Maintenance has been ordered upon the fair Inference of Intention, when a Legacy was given to Children, "when," and "as" they attain twenty-one, with Survivorship in case of any dying under that Age, and if all die the Legacy to cease (f). Where there is a specific Legacy of Stock, the

(a) 5 Ves. 195. Notis. 14
Ves. 202.

(b) 5 Ves. 540.

(c) 9 Ves. 470.

(d) 11 Ves. 2. 2 P. Wms.
21. 1 Atk. 507.

(e) 5 Ves. 194.

(f) 1 Coop. 443.

Dividends are due for Maintenance from the Death of the Testator (*a*). And the Court may by Order direct Payment of Dividends and Stock of Infants standing in the Public Companies to Guardians for the Maintenance of Infants (*b*): and where the Court can be satisfied that the Fund is clear, an Allowance for Maintenance will be made, pending the Account, to a residuary Legatee, but not if he be an Accounting Party (*c*), and the Court is satisfied *aliunde* that the Property is sufficient. Maintenance has been allowed to a Mother, where the Interest of the Legacies (*viz.* three hundred Pounds) has been trifling, upon her Affidavit of the Absence of the Father abroad in embarrassed Circumstances (*d*): and if there be no Cause in Court, an Order for a Reference as to Maintenance of an Infant may be obtained on Petition, where the Property is small (*e*); and so to approve of a Guardian and Maintenance where the Property was not more than two hundred Pounds per annum (*f*). And in similar Cases, Maintenance has been ordered upon Petition to be paid out of the Principal without any Reference (*g*); and the Court have given Costs of the Reference upon these summary Applications (*h*).

A Part of the Sum allowed for Maintenance of an Infant, has, under Circumstances, been directed to be paid to the Mother and Testamentary Guardian, although another Person had been appointed Guardian (*i*). But if the Guardian expends more in the Maintenance of an Infant than the Sum allowed, the Court will not make any Reference as to such extra Expenditure, unless a special Case is made

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| (<i>a</i>) 6 Ves. 349. | 88. 500. 2 Atk. 315. 15 |
| (<i>b</i>) 52 Geo. 3. c. 32. 158. | Ves. 445. |
| (<i>c</i>) 13 Ves. 92. | (<i>f</i>) 1 Ja. & Wa. 151. |
| (<i>d</i>) 15 Ves. 122. | (<i>g</i>) 1 Ja. & Wa. 253. |
| (<i>e</i>) 1 Vern. 255. 2 P. Wms. | (<i>h</i>) Ambl. 146. |
| 22. 6 Ves. 473. 3 Bro. C. C. | (<i>i</i>) 1 Cox. 179. |

for that Purpose (*a*). A large Allowance for Maintenance and Education has been ordered under Circumstances, though reluctantly (*b*). And where the Guardian or Father is in distressed Circumstances (*c*), or where younger Children are unprovided for, a large Allowance will be made to the eldest Son, to enable him to maintain them (*d*).

A *liberal* Allowance has been made to a legitimate Child, in respect of an illegitimate Son, born of the same Parents, unprovided for (*e*); but a *special Direction* to consider the Birth of a posthumous Son, in settling the Allowance has been refused (*f*): and the Court, in Cases where the Infants are absolutely entitled under a Will, has made an Order for an Increase of Maintenance beyond that prescribed by the Will (*g*). A Mother married to a second Husband, is not obliged to maintain the Children by the first, but is entitled to an Allowance for Maintenance, from their Fortunes (*h*): nor is the second Husband bound to maintain these Children (*i*): and if a Father leave his Children without a Maintenance, the Parish has no Remedy against his Executor (*k*). Where a Testator gave his Wife by Will, a considerable annual Sum, in addition to her Settlement, in Consideration of the Expences and Care she would sustain in the Maintenance of their Children, it was held that she must maintain them while at Home, but not to be charged with their Maintenance at School (*l*): and although the Words of the Will do not authorize Maintenance of Infants Devisees, if all entitled can be brought before the Court, and compensated, Maintenance will be

(*a*) 1 Cox. 417.

(*b*) 7 Ves. 403.

(*c*) 1 Ves. 160.

(*d*) 2 P. Wms. 24. 2 Atk.
447. 3 Atk. 511. 1 Bro. C. C.
179.

(*e*) 1 Ja. & Wa. 647.

(*f*) 1 Bro. C. C. 179.

(*g*) 13 Ves. 321.

(*h*) 1 Bro. C. C. 268.

(*i*) 3 Atk. 676. 4 T. Rep.

(*k*) 5 Ves. 444.

(*l*) 3 Ves. 33.

allowed, but where there is a Limitation over to Persons not *in esse* (*a*). And wherever a Legacy is given to a Child, let the Testator give it how he will, either at *twenty-one*, or Marriage, or *payable* at twenty-one, or Marriage, and the Child has no other Provision, the Court will give Interest by way of Maintenance; for it will not presume a Father so unnatural as to leave a Child destitute (*b*); but the Court will not allow Maintenance for Grand-Children (*c*). It is a general Rule, that a Trustee shall not of his own Authority break in upon the Capital of an Infant's Fortune, be it ever so small: and it is in very rare Instances that the Court has broken in upon the Capital for the mere Purpose of Maintenance, though frequently of Advancement (*d*): but Advances to a married Woman, deserted by her Husband, on the Credit of a Fund in Court, her Property, for her Maintenance, have been ordered to be reimbursed out of the Capital, though exceeding the Income of the Fund (*e*).

While Preparations are making to hear the Petition for Maintenance for the Infants, the Proceedings before the Master on the remaining Enquiries directed by the Decree may be going on: a *Charge* for Rents and Profits against the Defendant, who has received the Rents of the Estates, may be carried in before him: this must likewise be prepared from the Examination and Evidence *aliunde*, as Rentals, &c. A Warrant on leaving, and successive Warrants to proceed, must be taken out and served in the usual Manner on the Defendant's Clerk in Court. On attending the Warrant to proceed, the Evidence in support of the Charge must be read from the Defendant's Examination, or Answer in the Cause, or other Documents; and when gone through the Master marks the Charge allowed: if the De-

(*a*) 2 Swanst. 436.

(*b*) 3 Atk. 102.

(*c*) 1 Atk. 505. 2 Atk. 330.

(*d*) 6 Ves. 473.

(*e*) 18 Ves. 196.

defendant does not bring in his Discharge, Warrants to compel him must be taken out, underwritten, "At which Time the Defendant G. W. is to bring in his Discharge of Rents and Profits," and served on his Clerk in Court. When the Discharge is left (which is usually composed of the Allowances made to the Tenants for Taxes, Repairs, &c. and for which Vouchers must be produced) a Copy must be taken from the Master's Office, and the Warrants thereon attended; if the Defendant does not proceed, the Plaintiff's Solicitor must take out Warrants, and proceed upon the Discharge: the Discharge must be disposed of before the General Report can be prepared: but if not brought in after three Warrants taken out, and the Service verified on Oath, the Report will not be delayed, and the Defendant will stand charged with the whole of the Rents received.

As connected with the Account of Rents and Profits, it remains to subjoin a few Remarks on the *Apportionment of Rent*, in respect of Time: for this Purpose it should be observed that Rent is demandable at Sun-set of the Day on which it is reserved (*a*); or it may be voluntarily paid by the Tenant at any Time during that Day (*b*); yet as in strictness the Tenant has all that Day to pay it (*c*), it is not due and recoverable until the last Minute of the natural Day (*d*); on the Death, therefore, of a Tenant for Life, in the Interval between two Days of Payment, the fractional Portion of Rent accrued since the first, not being recoverable, a remedial Statute (*e*) has enacted, that where any Tenant for Life dies *before or on the Day* on which Rent is reserved or made payable upon any Demise or Lease of Lands, &c. which determined on the Death of such Tenant for Life, his Executors may recover, if such Tenant for Life die *on the Day* on which the same was made pay-

(*a*) Co. Litt. 202. 1 And. (c) Pre. Ch. 555. 1 P.
253. 1 Selk, 578. Wms. 177.

(*b*) 10 Rep. 6.

(*d*) 1 Saund. 287.

(*e*) 11 Geo. 2 c. 19. s. 15.

able. *The whole* ; or if before such Day, then *a Proportion* of such Rent, according to the Time such Tenant for Life lived of the *last Year*, or Quarter of a Year, or other Time in which the said Rent was growing due, making all just Allowances, or a proportional Part. The Legislature having thus interposed in favour of Tenants for Life, its Provisions have been extended by an equitable Construction to *Tenants in tail*, whose Leases are determined by their Deaths (*a*). It seems, therefore, that where a Lessor Tenant in Fee or in Tail dies *after* the Rent has become due, it will be payable to his Executor ; or if he dies *before*, to the Heir, or Remainder-Man, and so where the Lease is not determined by the Death of a Tenant for Life, where Rent was reserved Quarterly, and the Tenant for Life died on the Quarter-Day before Midnight, the Rent was held to belong to the Remainder-Man, and not to the personal Representative (*b*). And under a *parol* Demise from Year to Year by a Tenant for Life, with Power to lease by *Deed* ; the Interest of the Lessee determines with the Life of the Lessor, and the Rent is apportionable under the Statute (*c*) ; the Executor of a Rector has been held entitled to an Apportionment of Rent under a Lease of Tythes (*d*) ; but a Composition for Tythes is not within the Act (*e*). *Interest* may be apportionable, whether the Principal is secured by Bond or Mortgage, though expressly made payable half-yearly, as where Money was laid out upon Mortgage until a Purchase could be made, the Interest was held to be apportionable (*f*) : and Apportionment of Maintenance has been decreed, where for daily Subsistence (*g*), and the like of a separate Maintenance (*h*) : but Annuities or Dividends of

(*a*) Ambl. 198. 2 Bro. C.C. 662. 8 Ves. 311.

(*b*) 2 Madd. Rep. 268. 1 P. Wms. 177. 4 T. R. 173.

(*c*) 1 Swanst. 337. and the Cases cited.

(*d*) 8 Ves. 308.

(*e*) 2 Ves. and Be. 334.

(*f*) 2 P. Wms. 176. 1 Bro. P. C. 207. 2 Ves. 672.

(*g*) 2 P. Wms. 501.

(*h*) 2 Bl. Rep. 1016.

Money in the Funds are not apportionable; nor the Dividends upon Money directed to be laid out in Lands, and in the mean Time invested in Government Securities; and the Interest and Dividends to be applied as the Rents and Profits would in case it *were laid out in Land*, though the Tenant for Life died in the middle of the Half-Year (*a*). Land Tax and Quit Rents between Tenant for Life and the Remainder-Man are not apportionable under the Clause of the Statute (*b*). Land Tax being an annual Tax, the Tenant must deduct every Year's Tax from each Year's Rent; if not deducted from the Rent of the current Year, the Deduction cannot be made in any subsequent Year, nor recovered at Law from the Landlord (*c*).

When by the Decree Inquiries are directed, the Answers to which cannot, from their Nature, be obtained from the Parties to the Suit, or from any Evidence taken in the Cause, it will be necessary to examine Witnesses to obtain the proper Information. This Examination must be upon *Interrogatories*, which are not settled by the Master (as Interrogatories are for the Examination of Parties in the Cause (*d*)). The Interrogatories for the Examination of Witnesses must be settled and signed by Counsel (*e*), and therefore it is most advisable that Counsel should prepare them; and when settled and signed they must be engrossed on Parchment, with a five Shilling Stamp, and left with one of the Examiners in the Rolls Yard, to examine the Witnesses in Town, for which Instructions will be found in a former Part of this Work (*f*), as Depositions before the Master are not to be known, until the whole Examination is concluded (*g*); if it should be necessary to enlarge Publication, Warrants

(*a*) 3 Atk. 260. 592. Ambl.
279. 13 Ves. 135.

(*b*) 10 Ves. 66.

(*c*) 1 Brod. and Bin. 37.
2 *ibid.* 59. 3 Barn. and Ald.
516.

(*d*) 19 Ves. 593.

(*e*) Ord. Canc. Be. Ed.
273. 312.

(*f*) Ant. 191.

(*g*) 19 Ves. 593.

must be taken out and served upon the adverse Clerks in Court, and also upon the Examiner, and the Master upon the Attendance will exercise his Discretion, upon hearing all the Parties interested. When all the Witnesses have been examined, the Master will appoint a Day for passing Publication by a Warrant taken out and served upon the respective Clerks in Court, and also upon the Examiner, underwritten, “To pass Publication of the Depositions of the Witnesses taken by the Examiner;” after which Office-Copies of the Depositions will be delivered out. It may be useful to remark, that to lay a Ground for some of the Enquiries, a State of Facts should be previously brought in: in strict Practice it seems, that an adverse Party cannot examine Witnesses *in chief*, though he may cross-examine under a State of Facts brought in by the other Side, yet if the latter lie by, and in the Absence of a State of Facts by the adverse Party, suffers him to go on and examine, he cannot afterwards object to their Evidence; but Depositions on either Side to Points not in Issue, go for nothing. After an Examination in the Master’s Office has been concluded and made known, a further Examination of Witnesses will not be allowed to the same Matters without a special Order, upon Surprise clearly established (*a*): where the Proceedings are very adverse, it might be a wholesome Caution to put the Examiner upon his Guard against any sinister Application to obtain an Insight into the Depositions, previous to Publication by Warrant, and *ex abundanti*, where the adverse Solicitor is an Insolvent Court Attorney soliciting an Insolvent’s Suit.

If it be necessary to examine Witnesses who reside in the Country, above twenty Miles from London, an Order must be obtained upon Motion or Petition to the Rolls, for a Commission to examine Witnesses, grounded on the Master’s Certificate of the Necessity of such Commission, which he will give on being satisfied of the Fact (*b*), the

(*a*) 19 Ves. 590. 93. 600. (*b*) 3 Vos. 607. 9 Ves. 36.
1 Cox. 314. 1 Bro. C. C. 388.

Certificate must be filed at the Report Office, and an Office-Copy taken, and Instructions must be given to Counsel to move as of course, for a Commission to examine Witnesses with the usual Directions, with Leave to execute it in Term Time if necessary. The Brief-Instructions and Certificate must be left with the Registrar, and he will draw up the Order, which must be passed, entered, and served upon the adverse Clerk in Court, and the Order with Commissioners' Names, usually four, with proper Instructions to make out and seal the Commission, left with the Party's Clerk in Court, who will call upon the other Side for Commissioner's Names, to join in Commission; and in Default of being furnished with Names by the adverse Clerk in Court, will make out the Commission directed to the Plaintiffs own Commissioners, and in that Case the Defendants will not be permitted to examine any Witnesses under the Commission.

The Interrogatories must be ingrossed on Parchment, with a five Shilling Stamp, and sent down with the Commission into the Country to be executed, and the Witnesses examined thereon by the Commissioners at the Execution of the Commission.

HILARY TERM, 1821.

The Commission being executed and returned, the Bearer thereof, if a Commissioner, may leave it with the Plaintiff's Clerk in Court, at his Seat in the Six Clerks' Office, and no Oath is required from him; but if the Bearer of the Commission should not be a Commissioner, he must be sworn before a Master in Chancery that he received it from a Commissioner, and that it has not been opened or out of his Custody since; it is usually sworn at the Public Office, and the Commission and Depositions left there. Notice must be given to the Clerk in Court of the Commission being returned, that he may take it to his Seat in the Six Clerks' Office, from whence Office-Copies will be deli-

vered by the Clerks in Court, to such of the Solicitors as require them.

The Evidence obtained by the Examination may be read from the Office-Copies in support of any Charge or State of Facts, which it may be found necessary to lay before the Master by any Party in the Cause in the Proceedings before him, on the Directions contained in the Decree.

The Master is always directed to enquire, if the Testator was a Trader at the Time of his Death, subject to the Bankrupt Laws, and if he was, of what real Estate he died seised or possessed; and if any Copyhold, whether the same has been surrendered to the Use of his Will: some Doubt has arisen as to Copyholds being within the Statute: a State of Facts to answer these Enquiries should be prepared, and left with the Master, and Warrants must be taken out and attended, until the Enquiry is satisfied. If the State of Facts is disputed, the Master will require Proof to substantiate it, which may be read either from the Pleadings or Evidence in the Cause, or the Proceedings already before him, if such Proof can be collected from them; if not, he will require Interrogatories to be exhibited for the Examination of Witnesses, or of any Party in the Cause. He may sometimes be satisfied with an Affidavit, or other written Testimony applicable to the Subject.

So where the Testator is not a Trader, similar Enquiries as to his Real and Copyhold Estates are frequently directed. If the Master is directed to enquire and state to the Court, what Stock in the Public Funds a Testator was possessed of, at the distinct Periods of making his Will, and at the Time of his Death; the Governors of the Bank expect a Communication in Writing to be made to them by the Master, to whom the Cause is referred, to allow an Inspection of their Books by the Solicitor. Where it is necessary to give Evidence of Entries in the Books of the Bank of England, it should seem, that the Master is expected to give a Certificate, to justify the Bank in permitting the Inspection, rather than to compel the Parties by a Refusal, to file a Bill

for a Discovery, or more properly to apply to the Court for an Order upon the Bank, Lord Eldon has declared, that he would himself grant a Certificate upon a proper Case being laid before him (a).

Where the Decree directs the Costs of all Parties to be taxed and paid, up to the Hearing, it will be proper, while the Proceedings are going on before the Master, to take out a Warrant, underwritten, "At which Time all Parties are to bring in and leave their Bills of Costs to the Hearing of the Cause." Copies of the Warrant must be served upon the respective Clerks in Court, and the Plaintiff's Solicitor should bring in his own Bill of Costs, and take out and serve a Warrant on leaving, underwritten, "The Plaintiff hath left his Bill of Costs to the Hearing;" and successive Warrants to "tax the Plaintiff's Costs." If the other Parties are dilatory, three Warrants "to bring in and leave their Costs," must be taken out and served upon their Clerks in Court, and if their Bills of Costs are not brought in, upon Oath before the Master of the regular Service of the three Warrants on their respective Clerks in Court, the Master will certify their Default and make his Report, excluding them of their Costs. And so if the Costs are brought in, and no Proceedings taken thereon, the Plaintiff's Solicitor, or the Party's Solicitor who prosecutes the Suit, may take out Warrants and proceed to tax such Costs, and proceed *ex parte*, if no Person attends to support these Costs. Before the Master can make his General Report the Costs must be disposed of, either by Taxation, or by excluding them upon Default, after the Service of three Warrants.

A *Particular in Writing* of the Estates directed by the Decree or Order to be sold, must be prepared by the Solicitor for the Plaintiff, or the Party prosecuting the Cause, for which, as to the local Description and the Title of the Venders, sufficient Information may be obtained from the Proceedings in the Cause; the Title Deeds left at the Master's

Office, Maps and Surveys, and other Documents. In some Cases it might be prudent for the Solicitor to abstract himself from all personal Responsibility, by calling to his Assistance an experienced and skilful Person, conversant in the Sale and Value of Estates, residing near the Property, for the Purpose of describing and allotting the Premises for Sale. In preparing the Particular it may be material to observe, that if the printed Description and Conditions of Sale are calculated to deceive, as to the real Value of the Estate, no Compensation would be allowed in the Case of great Intentional Misrepresentation, although the Conditions should provide that any Error or Misrepresentation should not vitiate the Sale, but that a proportional Allowance should be made as a Compensation either Way (*a*); but it should seem, that a small Variation, or a trifling Error in the general Description of the Land, has been held not to be material (*b*); a small Incumbrance has been held to be a Subject of Compensation (*c*); and so, Quit Rents as Subjects of Tenure (*d*): and Out-Goings not disclosed in the printed Particulars (*e*). And a Deficiency in the Quantity, where described as containing by Estimation so many Acres, be the same more or less (*f*): but a *Rack-rent* described as a *Ground-rent*, has been held a fatal Variation (*g*); and so a Rent Charge, being the Act of the Party (*h*). If a Leasehold is to be sold, without producing the Lessor's Title, it should be so described in the Particulars of Sale (*i*). It may be useful to observe, that the Master's Judgment in settling the Particulars of Sale is discretionary and conclusive: where to help out a bad Title, the Master refused a Condition restraining an Enquiry into the Title by the Purchaser, beyond the Period of forty Years: upon Application to the

(*a*) 1 Meri. 26. 1 Camph.
337.

(*b*) 1 Ves. 212. 221.

(*c*) 5 Ves. 818.

(*d*) 1 Sim. & Sta. 122.

(*e*) 1 Cox. 59.

(*f*) 1 Ves. & Bea. 375.

(*g*) 1 Meri. 26.

(*h*) 1 Sim. & Sta. 122.

(*i*) 3 Meri. 53.

Court, the Vice-Chancellor dismissed the Motion *brevi manu*, observing that the Master was the proper Person to judge of the Title, and that the Court would put no Terms upon him (a).

The *Particulars of Sale* must be transcribed upon plain Paper, and left at the Master's Office, and a Warrant "on leaving the Particulars of Sale of the Estates directed by the Decree," must be taken out and served upon the Clerks in Court for those Parties interested in the Sale, who take Office-Copies, and successive Warrants "to settle the Particulars of Sale," taken out and served; these Warrants must be attended, and the usual Course of Proceeding *ex parte* taken, if the adverse Solicitor neglects to attend. If the Court has directed a reserved Bidding, the Conditions of Sale must express, *that the Venders reserve one Bidding for each Lot, or for the Estate if offered in one Lot*, to be fixed by the Master: the Allowance of the Particular by the Master, is signified by setting his Initials, or marking the Particular allowed, and not by a Certificate. The Solicitor procures Copies of the Particulars to be printed and dispersed, paying an Office-Fee of Six-pence per Side for only so many printed Copies as there shall have been *actual Bidders* at the Sale (b). A sufficient Number of the printed Particulars should be left at the Master's Office, and the Offices of the Solicitors for the several Parties in the Cause; and in Country Sales, sent down to the Solicitors and Surveyors to be dispersed in and about the Town and Places where the Estates are situated.

Where it appears to be more advantageous to the Parties, that an Estate situated at a considerable Distance from Town, should be *sold in the Country*, than in the Public Sale-Room of the Court; and that a *Bidding should be reserved* on behalf of the Parties interested in the Estate; an Order comprising both these Requisites, must be ob-

(a) Wontner v. Wright,
Trin. 1822, MSS.

(b) Ord. Can. Bea. Ed. 483.
2 Ves. and Bea. 417.

tained upon *special* Motion or Petition, supported by an Affidavit of the Facts and Circumstances, authorizing the Master *to appoint a proper Person, and a Time and Place for Sale*; and if a Bidding is to be reserved, the Order directs him to fix *one reserved Bidding for the Estate, if sold entire, or if in Lots, one Bidding for each Lot*; and to make such reserved Bidding one of the Conditions of Sale, which he may in his Discretion communicate to the Parties or their Solicitors; and a Note in Writing containing the Sum fixed for such Bidding is to be delivered by the Master under a *sealed Cover* to the Person appointed to sell; and if a higher Price or Sum should not be bidden at the Sale, the Estates are to be declared not sold, but bought in for the Parties interested in the Estates (a). The Order must be passed and entered, and it is usually served upon the adverse Clerks in Court.

To appoint a *Person and a Time and Place of Sale in the Country*; where the Estate directed to be sold is of considerable Value and Extent, the Master usually appoints his own Clerk to conduct the Sale; but for the Sale of Estates of small Value, at a great Distance from Town, the Order must be left at the Master's Office, and a State of Facts and Proposal brought in, stating shortly the Order of Reference, the Description of the Estate, of what it consists in Quantity and Quality, and of what annual Value, where situate, and that it would be more for the Benefit and Advantage of the Parties interested in the Sale, that the Estate should be sold in the Country, than in the Public Sale-Room of the Court in Town; that A. B. is a respectable Person, and that he is in the Habit and Practice of selling Estates; that he lives at ———, near which the said Estate is situated; that he knows the Estate and the Value of it; and that he is willing to undertake the Sale thereof; and that he is a fit Person to be intrusted to conduct the said Sale: *proposing* that the Estate may be sold

(a) 1 Ja. and Wa. 392.

at ———, and that the said A. B. may be appointed to sell the same: the State of Facts and Proposal should be supported by Affidavit, verifying the material Allegations. Warrants on leaving the State of Facts, and Warrants to proceed must be taken out and served on the respective Clerks in Court, and attended, and the Master's Certificate of the Appointment of a Person, and Time and Place of Sale must be filed at the Report-Office, and an Office-Copy taken and delivered to the Person appointed to sell; but no Warrants on preparing, nor to sign the Certificate are taken out, nor any Application made to the Court for Confirmation. Proper Instructions and Directions must be given for the Purposes of Sale; and when the Sale is over, an Affidavit prepared by the Master's Clerk, and sworn by the Person so appointed, with the Bidding Book and printed Particular annexed, stating the Sale, the respective Biddings, and the Sum the Estate sold for, and to whom by Name is required. It may be useful to remark, that a Proposal to appoint a London Auctioneer or Surveyor, would be rejected, and an Attorney or Solicitor is disqualified. If the Order also directs the Master *to fix a reserved Bidding*, a correct Valuation of the Estate must be made by an experienced and skilful Surveyor, setting out in Schedules the Amount of the Rental, and the estimated Value of the whole Estate, and of each Lot separately, and the Sum at which the same ought to be sold together, and also at what stated Sum each Lot ought to be sold. A State of Facts comprising shortly the Order, and the Valuation of the Estate, and an Affidavit by the Surveyor in support of the Valuation, must be brought into the Master's Office; the usual Warrants on leaving and to proceed, must be taken out and served on the respective Clerks in Court and attended. The Master draws a Conclusion from the Evidence before him, and in the Absence of all Parties fixes a Bidding as directed by the Order, which he commits to Writing, and incloses under *a sealed Cover*, and delivers to the Person

appointed to sell the Estate, for the Purposes mentioned in the Order; but he makes no Report or Certificate of the Proceeding.

The Particulars being brought in and allowed, *the Advertisements* for the Sale may be obtained from the Master's Office. The first Advertisement is general, informing the Public that such Estates are to be sold before the Master, appointing no Time for the Sale. The Solicitor may draw Instructions for the Advertisement, or more properly the Master's Clerk will prepare it, and procure the Master's Signature, to authorize an Insertion by the Printer of the Gazette, to whom the original Advertisement signed by the Master must be delivered for Publication. If the Estates are well known to the Plaintiff's Solicitor, and there is no Dispute as to the Particular Estates which are to be sold, the first Advertisement for the Sale may be applied for, and inserted in the Gazette if necessary, and in the Country Papers, in an earlier Stage of the Proceedings: about a Month or three Weeks after the Insertion of the first Advertisement, a Warrant must be taken out to fix a Time for the Sale of the Estates, and served on the Clerks in Court, for all the Parties interested: the Warrant being attended, the Master will fix a Time, with the Approbation of all Parties; and the second Advertisement may then be had, and inserted in the Gazette; and it should likewise be inserted in some of the Newspapers in Town, and in the Country (a); for the latter there is an Office for Country Papers in London.

HILARY TERM, 1822.

The Sale of the Estates at the Public Sale-Office, in Southampton Buildings, should be attended by the Solicitor for the Plaintiff. The Sale is conducted in the following

(a) Ord. Can. Bea. Ed. 483.

Manner: the Master's Clerk prepares a Paper, on which the Biddings for the different Lots are to be marked. The Lot is put up at a Price offered by some one present, who signs his Name to the Sum which he offers on the above Paper; every other Bidder does the same, until no Person will advance on the last Bidder, who is then declared the Purchaser. Thus are all the Lots sold. If any should remain unsold for want of Bidders, they must be again advertised for Sale.

Each Purchaser procures a Report from the Master, of the Lot or Lots he has purchased, which is filed at the Report-Office, and an Application is then made to the Court, by Motion of course, that the Purchase may be confirmed; and if the Parties in the Cause are six or more, an Addition may be made to the Motion, that Service of the Order on the Clerks in Court for the Parties in the Cause, may be deemed good Service: on a Suggestion, that the Parties are many in Number, and live remote from each other, a Direction to that Effect will be made Part of the Order. The Order made on this Application is an Order Nisi, that is, confirming the Report of the Purchase, unless Cause be shewn against the same in eight Days after Service. When the Parties in the Cause do not exceed six, Service of the Order on their Clerks in Court will not be granted; and in that Case it must be served *personally* on the Parties; but if the Parties live very remote from each other, upon an Affidavit of that Fact, the Court will direct Service upon the Clerks in Court. If no Cause should be shewn within eight Days after Service of the Order Nisi, the Purchaser must apply to the Court by Motion, to make the Order Nisi absolute for confirming the Report, which will be ordered as of course, upon an Affidavit of Service of the Order Nisi, and a Certificate thereon by the Register, of no Cause being shewn to the contrary, dated on the Day of the Application (*a*), for which Purpose the Order Nisi must be

(*a*) 3 Swanst. 98. 14 Ves 180

left with the entering Clerk at the Register's Office, two or three Days before: but unless the eight Days limited by the Order have expired, the Application to confirm the Report will be irregular and refused: an Application *for Leave* to move prospectively to confirm the Order Nisi two Days after the next Seal-Day, when the eight Days would expire, has been refused with Costs (a). By Consent, the Order to confirm the Report may be made absolute in the first Instance; but this Practice is very irregular, and precludes the Opportunity given by the eight Days, in the Order Nisi, to open the Biddings. The Purchaser will then be entitled to a Conveyance, on Payment of his Purchase Money, and to be let into Possession.

To open the Biddings, an Application should in strictness be made, before the Report of the Purchase is absolutely confirmed. The Course of Practice is, for the Person desirous of advancing on the Sum offered by the highest Bidder for the Lot in question, to apply to the Court by Motion, on or before the Day when the Motion is made to confirm the Order Nisi for Leave to open the Biddings, stating the Advance offered, giving Notice to the Purchaser of that Lot, and to the Parties in the Cause. See Title "Notices." If the Court approve of the Sum offered, the Application will be granted, and the Order must be drawn up, passed, entered, and served upon the respective Clerks in Court, and left at the Master's Office, and a new Sale will take place before the Master. This Application is allowed as Cause shewn against the Order for confirming the Purchaser's Report absolute, and consequently the Purchaser is discharged. To make the Order effective, the Terms of it must be complied with, and the Person opening the Biddings, must pay to the discharged Purchaser his Costs, &c. and pay his Deposit into the Court, and he is sometimes considered as a Bidder at that Sum, if no other Person advances on such

(a) 11 Ves. 600.

Offer; but before the Master can proceed to a re-Sale, the Costs must be paid, and the Deposit made.

Biddings are opened for the Benefit of the Suitors, and of the Estate, not of the Purchaser (*a*). The Rules which regulate the opening of Biddings upon Estates, do not govern in the Sale of Collieries, being considered as a Trade (*b*). The Court in opening Biddings, has not laid down any fixed Rule as to the *per Centage* of Advance upon the former Purchase; more or less will be required, according to Circumstances (*c*); but a Deposit must in all Cases be made on opening Biddings (*d*). In some Instances, the Biddings have been regulated as in ordinary Sales by Auction, and opened upon an Advance of 10*l.* per Cent (*e*); and that has been held sufficient on small Sums, but is not to prevail in future; and it seems now to be a general Rule not to open a Bidding, unless upon an Advance of 40*l.* (*f*): an Offer of 50*l.* on a Bidding of 380*l.*, and 61*l.* on 305*l.* paying the Expences, has been taken (*g*); and the Court has permitted an Advance of 100*l.* to open a Bidding of 800*l.*; and so an Offer of 200*l.* a Bidding of 1200*l.* (*h*); and a Bidding of 3200*l.* has been opened upon an Advance of 200*l.*; which upon an Offer of 100*l.* only, was refused (*i*). In a Creditor's Suit, an Advance of 500*l.* has been taken upon a Bidding of 10,000*l.* (*k*), paying the whole Advance into Court, and the Expences. The Court seems not to confine itself to a particular Rate *per Cent.* though 10*l.* *per Cent.* is a sort of general Rule: where an Advance so large as 500*l.* is offered, the Court will act upon it, though less

(*a*) 1 Ves. j. 453. Coop. 95.

(*g*) 4 Ves. 700. 5 Ves. 86.

(*b*) 1 Turn. Rep. 70. 8 Ves. 502.

(*h*) 2 Ves. j. 487. 7 Ves. 420.

(*c*) 1 Sim. and Stu. 21.

(*i*) 5 Ves. 148. 655. Hands'

(*d*) 6 Ves. 513.

Chanc. 142.

(*e*) 14 Ves. 151. 3 Madd. 494.

(*k*) 3 Ves. and Be. 144.

7 Ves. 420. 4 Madd. 460.

than 10l. *per Cent.*, but an Advance of 350l. upon 3500l. has been refused (a).

Biddings have been allowed to be opened (b) with much Doubt as to the Regularity, upon a second Application by the *same Person*, who opened the former Biddings, offering an Advance of 160l. upon 1335l., upon the Payment of the whole Advance and all the Costs; the Purchaser, upon Notice, *not appearing or objecting* (c). Where two Lots were purchased by the same Person, and the Advance offered on the lesser Lot, was not sufficient to authorize the opening of the Biddings for that Lot separately, the two Lots were ordered to be re-sold in one (d): on the Sale of a *Colliery*, an Offer to give 10,000l. has not been allowed to open a Bidding of 8850l. (e), but a mere Advance of Price is not alone sufficient to open Biddings after the Confirmation of the Report; an Advance of 2000l. upon 28,000l. was allowed, where a Mistake had been made in the Particulars of Sale, and the Purchaser had been a Steward in the Family (f): and it seems to be an *invariable Rule*, adopted by the Court, that a Person applying to open Biddings, must make a Deposit sometimes of 10l., generally of 20l. *per Cent.* on the Sum offered, though the Parties may be satisfied with it; in many Circumstances, a larger Deposit has been required, and in some Cases, and of late very frequently, a Deposit of the *whole Advance* (g). If a Person who opens Biddings neglects the Order and Deposit, another may open the Biddings upon Notice to him (h). The Order made upon opening the Bidding, directs the discharged Purchaser to be paid by the Person opening the Bidding, all Costs, Charges, and Expences occasioned by his being reported the best

(a) 1 Sim. and Stu. 20.

(b) 3 Ves. and Beam. 144.

(c) 16 Ves. 140.

(d) 4 Bro. C. C. 13. 1 Ves. 140.

Sim. and Stu. 23. 3 Anstr. 657.

(e) 5 Ves. 86. 1 Turn. 70.

(f) 2 Eden. 348.

(g) 6 Ves. 466. 513. 16

(h) 4 Madd. 52.

Purchaser of the Premises comprised in the Lot purchased, to be taxed by the Master, in case the Parties differ, and upon Payment of the latter and Deposit, refers it back to the Master, to allow of a better Purchaser of the Premises comprised in that Lot (a). The Expences of a Journey, by the Purchaser, to view the Estate, has been allowed by the Master under the Reference, as Part of the Costs; but the Court has refused to give any particular Direction as to any specific Expence (b). The Charges of a Sale, it should seem, the Master is authorised to tax under the Head of *just Allowances* (c); but in adverse Proceedings, an Order must be obtained, and the Directions in the Order must be followed. The Master cannot proceed to a Re-sale, until the Deposit is made, and the Costs, Charges, and Expences of the discharged Purchasers are paid (d). It may be useful to observe, that if the Person opening the Biddings be out-bid at the Re-sale, although the Estate sells considerably higher, he cannot, on that Ground, have his Costs, whatever Benefit his Interference may have been of to the Estate, but he is entitled to his Deposit (e); and most decidedly not, if it should appear that it was a mere Speculation for his own private Advantage. To put himself in a Situation to ask for Costs, he must shew that his Object was for the express Benefit of the Family, and not on his own Account, and that by an Advance on the Re-sale, the Family was in fact considerably benefitted (f); as in the Instance of a Re-sale, on opening the Biddings, producing a *considerable Increase of Price*, (8000l.) the Court held that to be *no Ground* for giving Costs to the Person who opened the Biddings, and refused the Costs, but ordered the Deposit to be returned (g). And a Solicitor buying in Lots to prevent a

(a) Hands' Chanc. 141.

(b) 2 Ves. j. 236.

(c) 18 Ves. 285.

(d) 2 Ves. j. 286.

(e) 6 Ves. 466. 8 Ves. 214.

1 Ves. and Bea. 361.

(f) 9 Ves. 348. 12 Ves. 6.

(g) 1 Ves. and Bea. 361. 8 Ves. 214.

Sale at an undervalue, will be held to his Biddings if the Court should think he ought (*a*). The Biddings ought to be opened by real Bidders: where a Solicitor on behalf of sham Bidders opened the Biddings, and afterwards set up sham Bidders, and not proceeding to complete the Purchase, *Lord Hardwicke* set aside their Report of Purchase with Costs, and ordered the Solicitor to stand as the best Bidder, at the Price at which he had opened the Biddings (*b*). On the Sale of an Estate to a Solicitor who had pulled down Buildings and erected new ones, the Improvements were ordered to be valued, and the Estate put up for Re-sale, at the improved Value, and held to his Bargain if no higher Bidder (*c*). There seems to have been some Doubt, whether a Person, *present at the Sale*, could in Strictness apply to open the Biddings (*d*). *Lord Kenyon, M. R.* refused Applications on that Ground, which *Lord Eldon* in a late Case observed, *unfortunately* had not been uniformly pursued; a satisfactory Offer, therefore, by a Person, under such Circumstances, will be received (*e*); but it seems not to be an established Rule; and in a recent Instance, the Vice-Chancellor refused to open Biddings by a Person present at the Sale (*f*): after Confirmation of the Report absolutely, *Negligence, Surprise, or Delay*, in not making an earlier Application, under a mistaken Apprehension that another Person had given Notice of Motion for the same Purpose (*g*), will not be sufficient to induce the Court to open the Biddings of a fair Purchaser: the mere Increase of Price (*h*) has been held not of itself a Ground to disturb his Purchase; when large, it is a strong auxiliary Circumstance: where, however, the Owner of the Estate, who joined in the

(*a*) 14 Ves. 517.

(*b*) Dick. 289.

(*c*) 6 Madd. 2.

(*d*) 5 Ves. 655. 6 Ves. 117.

(*e*) 16 Ves. 140. 6 Ves.
117. 513.

(*f*) 3 Madd. 314. 1 Turn.
Rep. 70.

(*g*) 5 Ves. 86. 11 Ves. 57.

14 Ves. 151. 2 Ja. & Wa. 347.

(*h*) 3 Anstr. 656. 3 Br. C. C.
475.

Motion was in Prison, when the Report was confirmed, and a Fourth of the original Price was offered in Advance: the Court, under all the Circumstances, allowed the Biddings to be opened, but a Deposit of the whole Advance was ordered (a). Where the Purchaser was insane, and found to be so, before the Report was confirmed, the next best Bidder was not allowed to stand as Purchaser, though consented to, but the Estate was ordered to be *re-sold* (b).

It seems to be now settled, that Fraud or Misconduct in the Purchaser, or fraudulent Negligence in another Person, as the Agent, of which it would be against Conscience that the Purchaser should take an Advantage, or some particular Principle, arising out of the Character of the Purchaser, as connected with the Ownership of the Estate, or some Trust or Confidence, or Conduct in the Purchaser in obtaining the Report; that in any of these Cases, the Confirmation of the Report will not prevent the Court from opening the Biddings (c): where an Estate had been sold before a Master prematurely, the Purposes of the Decree not requiring it, the Sale was held irregular, and set aside, although the Reports of the Purchasers had been *confirmed absolutely*, and the Purchase Money *paid into the Bank*; but in setting aside the Purchase, the Court directed Interest at 5l. *per Cent.* and all Costs, Charges, and Expences to be paid to the Purchasers (d).

As connected with the Sale of Estates, it may be useful to observe generally, that the employing a Person to bid up to a certain Price, to prevent a Sale at an under Value, is not fraudulent, and has been held not to avoid the Sale, nor to prevent a specific Performance of a Contract (e): *Secus*, if

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| (a) 4 Br. C. C. 177. 2 Ves. | C C. 177. 287. 2 Eden. 348. |
| j. 51. | (d) 1 Cox. 34. 1 Eden. 18. |
| (b) 1 Cox. 205. | (e) 3 Ves. 620. 655. n. 2 |
| (c) 5 Ves. 86. 11 Ves. | Bro. C. C. 331. 28. Geo. 3. c. |
| 57. 1 Bro. C. C. 287. 4 Bro. | 17. s. 30. |

merely to take Advantage | of the *Eagerness of Bidders*, and to *screw up* the Price ; or if all the Bidders are *Puffers*, except the Purchaser (*a*) ; but if there are real Bidders, who bid against each other, the Bidding of the *Puffer* does not invalidate the Sale (*b*).

For the Information of the junior Practisers, in this Place it may not be improper to consider the Competency of Purchasers, in Fiduciary Situations, of Trust Property (*c*).

It is an established Rule of the Courts of Equity, *that a Trustee shall gain no Benefit by any Act done by him as Trustee, but that such Benefit shall accrue to his Cestui que Trust*: upon this Principle, and to prevent *Fraud* (*d*), a Trustee is not permitted, nor the Attorney of a Trustee, to become a Purchaser of a Part, or of the whole of the Trust Estate (*e*) ; and the Rule has been extended to the Agent of the Trustee employed to sell the Trust Estate (*f*). *Commissioners, Assignees, and Solicitors* under a Commission of Bankruptcy, are within the Rule, and are not allowed in their private Character to purchase the Bankrupt's Property (*g*) ; so, a Committee, or the Keeper, is not allowed to purchase the Lunatic's Estate ; nor can an Executor purchase for his own Benefit, his Testator's Effects (*h*). *Lord Hardwicke* determined that a Trustee could not even buy at a *Sale by Auction* (*i*) : and according to the more

(*a*) 12 Ves. 483.

(*b*) 6 Term. R. 642. 4
Bro. P. C. 193. 6 Bro. P.
C. 520.

(*c*) 1 Madd. Chanc. 109. 1
Ch. Ca. 191.

(*d*) 6 Ves. 632.

(*e*) 2 Atk. 59. 5 Ves. 707.
7 Ves. 196. 8 Ves. 345. 9
Ves. 234. 12 Ves. 372. 3
Meri. 200.

(*f*) 5 Madd. 91. 13 Ves.

95. 2 Cox. 253. 320.

(*g*) 6 Ves. 617. 627. 10 Ves.
3. 385. 8 Bro. P. C. 42. 2
Dow. 200.

(*h*) 13 Ves. 156. 1 Ves.
and Bea. 171. 1 Cox. 134. 18
Ves. 120. 313. 1 Gly and I.
14, 69.

(*i*) 1 Ves. 9. 5 Ves. 682, &
Belt. Supp. 8. 3 Meri. 207.

recent and approved Decisions of *Lord Eldon*, whether the Bargain be advantageous or not, the Sale is in every Instance bad; for if a Trustee can buy in an honest Case, he may in a Case having that Appearance, but which may be grossly otherwise (*a*). So jealous is the Court of Chancery of a Trustee taking Advantage of his Situation *to benefit himself*, that it has been decided that a Trustee could not purchase *for his own Benefit* Property, which the Owner refused to sell to the *Cestui que Trust* (*b*); but if on a Purchase by a Trustee, it is found to be for the Benefit of an Infant *Cestui que Trust*, that the Purchaser should be held to his Purchase, it will not be set aside. A residuary Legatee, or Tenant for Life, or the Owner of the reversionary Interest, are held not to have such an Interest, as to prevent them becoming Purchasers of Estates, sold under a Decree in the Master's Office (*c*). A Mortgagee of a Bankrupt's Estate, has been allowed by Order to bid on the Sale of the Estate mortgaged (*d*); and so a Party in the Cause has been allowed to bid for himself, in a Sale directed by the Court (*e*); but an Auctioneer, whilst his Employment continues, cannot purchase the Estate he is engaged to sell (*f*).

An *Attorney* is not allowed to purchase any thing in Litigation, of which he has the Management (*g*); and if employed as *Agent* to purchase for another, he cannot buy for himself, until his retainer as Attorney is ended (*h*): and the Rule applies as between *Principal and Steward* (*i*), and to Alienations between *Mortgagor and Mortgagee* (*k*).

(*a*) 10 Ves. 385.

(*b*) 8 Ves. 348. 10 Ves. 385. 95. 2 Bro. C. C. 400. 1 Sch. and Lefr. 131. 7 Bro. P. C. 367.

(*c*) 1 Coop. 95. 1 Turn. Rep. 70.

(*d*) 1 Madd. Rep. 148.

(*e*) 1 Ja. and Wa. 389. 538.

(*f*) 16 Ves. 516.

(*g*) 1 Cox. 134.

(*h*) *Smith v. Midgoley*, 15th Dec. 1804. MSS.

(*i*) 13 Ves. 475. 5 Ves. 485.

(*k*) 2 Sch. and Lefr. 218. 673.

When the Master's Report has been confirmed *absolutely*, the Purchaser upon Payment of his Purchase Money, is entitled to call upon the Vender for a Conveyance of the Estate, and to be let into Possession and Receipt of the Rents and Profits, from the Quarter-Day next preceding the Application. It should not escape the Attention of the junior Practiser, that until the Report is *absolutely* confirmed, no adverse Proceedings can be taken against the Purchaser to complete his Purchase (a); but the Order for Payment *stating* the Purchaser to be content with the Title, the Solicitor for the Purchaser, before he suffers his Client to part with his Money, usually applies to the Vender's Solicitor for an Abstract of the Title to the Lot purchased, which the Latter is obliged to give, before he can set on foot any compulsory Proceedings to complete the Purchase (b), with the Exception, that through some Default in the Purchaser, the Solicitor for the Vender, has been allowed to obtain an Order to confirm the Report of Purchase (c). If upon perusing the Abstract, the Purchaser's Solicitor should be satisfied with the Title, he may then prepare a Draught of the Conveyance; and the Purchaser should obtain an Order upon Notice to the Clerks in Court, for all the Parties interested, (*see Title Notices*) that he may be at liberty to pay in his Purchase-Money, and be let into Possession of the Estate purchased, and into the Receipt of the Rents and Profits, from the *Quarter Day next preceding* the Payment of the Purchase-Money (d): and this Rule of the Court as to the Possession, has been so strictly followed, that upon an Application in *Trinity Term*, to be let into Possession from the *Christmas-Day* preceding, supported by an Affidavit of the Purchaser, that his Money ever since the Purchase had been lying dead, in a Banker's Hands, and that he was always ready to complete his Purchase; the

(a) 2 Ves. j. 335.

(c) Sanders v. Grey, Trin.

(b) Hodder v. Raffin, Mich. 1811. MSS.

1810. MSS.

(d) 1 Ja. and Wa. 638.

Court in refusing the Motion observed, that an Application should have been made to pay in the Money, where it might have been laid out, and which if done by special Application, would not have been an Acceptance of the Title (a).

But this Rule of giving Possession from the Quarter-Day, holds only in Purchases of Fee simple Estates; there are Cases where it is regulated by the Nature of the Property sold, and the usual Course of taking the Account of the Profits, and which the Solicitor for the Estate should particularly attend to, when the Motion comes on, and in drawing up the Order; as in the Instance of *Collieries*, Mining Property, &c. where the Profits are accounted for, and settled Monthly or Weekly (b). So in the Sale of Manors; Deaths or Alienations happening before the Quarter-Day, the Fines due and not paid or assessed until after that Period, are considered as having accrued before: and upon the Purchaser's Application to be let into Possession, the Solicitor should be careful that the Court, in making the Order, gives Directions to the Purchaser, to receive and pay such Fines to the Venders (c). Where Estates held for Lives have dropped in after the Report has been confirmed, and before the Purchaser has been let into Possession, Compensation for the Benefit the Estate has received by that Event, has been directed to be made by the Purchaser, or the Estate to be re-sold (d): but a Loss by Fire, before the Confirmation of the Report of Purchase, although the Delay is occasioned by the Purchaser in opening the Biddings, must be borne by the Vender (e). After the Report is absolutely confirmed, the Purchaser must, from that Time, or rather from the Time when he could have confirmed the Report (f), pay Interest on his Purchase Money, and the Vender becomes a Trustee for the Pur-

(a) 1 Coop. 95. 1 Turn.
Rep. 70.

(b) 8 Ves. 502.

(c) 2 Cox. 231.

(d) 3 Atk. 638.

(e) 11 Ves. 559.

(f) 13 Ves. 517.

chaser, who has all the Advantages or Disadvantages of any Casualty after that Period (*a*): a Deposit upon opening a Bidding, is considered as Part of the Purchase-Money paid; and if laid out in the Public Funds, which rise considerably between the Time of the Deposit and the Purchase being completed, the Estate will have the Benefit of the Rise, and not the Purchaser (*b*): where the Deposit had been laid out, and the Accumulation considerable, pending Objections to the Title, the Depositor was held only entitled to Interest on the Deposit, at 4l. *per Cent.* (*c*).

It should be observed, that the Report when confirmed has relation back to the Purchase; Lord Eldon held, that the Contract was made the Moment the Purchaser's Name was entered in the Master's Book (*d*): and the Purchaser has been considered as Owner from the Time he comes into Possession, pays in his Purchase Money, and declares himself satisfied with the Title; and not from the Confirmation of the Report, pending Objections to the Title (*e*).

Where no Period is fixed from which a Purchaser is to take the Dividends of Stock put up for Sale, the Purchaser of a Life Interest in Stock sold before the Master, has been entitled to a Dividend becoming due the Day following the Sale: as in like Manner, Purchase Money must have been paid, if Tenant for Life had died the same Night (*f*).

The Plaintiff's Solicitor, upon the Application by the Purchaser to pay in his Purchase Money, should instruct Counsel to appear, and request that the Money when paid in, be laid out in the Purchase of Bank Annuities, if it should be advisable, and for the Benefit of the Parties to have that done. Frequently the Order directs that the Money should not be paid out without Notice to the Purchaser; but after the Title has been accepted, the Purchase Money paid into Court, and Conveyances executed, the

(*a*) 2 P. Wms. 410.

(*b*) 1 Cox. 194.

(*c*) 1 Cox. 206.

(*d*) 1 Ja. and Wa. 637.

(*e*) 2 Madd. Rep. 34.

(*f*) 1 Ja. and Wa. 639.

Court will not impound the Money upon an Objection from the Purchaser grounded on Notice of an adverse Claim; if evicted, he must resort to the Covenants in his Conveyance (a).

When any Dispute arises, either upon the Title of the Vendors to the Estate sold, or on the Draft of the Conveyance to the Purchaser, which the Solicitors cannot settle; in the former Case, on the Part of a Purchaser proceeding to complete the Title to his Purchase, an Application must be made to the Court by Motion, that the Vendor's Solicitor may deliver an Abstract of the Title, or if an Abstract has been delivered, for the usual Order of Reference to the Master, to see whether a good Title can be made; the Party applying must draw up, pass, and enter the Order, which with the Abstract of the Title, must be carried in before the Master, and an Office-Copy taken by the Purchaser's Solicitor. Warrants on leaving, and Warrants to proceed on the Abstract, must be taken out by the Purchaser's Solicitor, and served upon the Clerks in Court for the Parties interested in the distribution of the Assets: It may not be improper here to remark, that the Court of Chancery employs its Officer to *investigate*, but it does *not warrant* the Titles to Estates decreed to be sold (b): it is incumbent, therefore, on the Solicitor for the Purchaser to examine very strictly into the Title of an Estate purchased under a Sale directed by the Court. A Work of deservedly high Reputation, lays it down generally, that a Purchaser has a Right to insist upon having a *clear legal* Title, commencing at least *Sixty Years* anterior to the Time of his Purchase, and sometimes for a longer Period, where there are Remainders, after existing Estates tail (c): an Application to restrict an Enquiry into the Title, to the Period of forty Years last past, was rejected *brevi manu*, and the Costs of the Application visited upon the Insolvent

(a) 2 Cox, 394.

(c) Sugd. Vendors, 259.

(b) 3 Meri. 223.

Court Attorney giving the Instructions (a). The Solicitor for the Purchaser should carefully examine and compare the Abstract with the Title Deeds left in the Master's Office. Should it be necessary to enforce the Production of the Title Deeds, Instructions will be found in another Part of this Work (b). The Master proceeds to investigate the Title upon the Abstract brought in under the Order of Reference, and unless the Purchaser in that Stage of the Proceeding insists upon Production of the Deeds referred to by the Abstract, he cannot afterwards make the non-Production a Ground of Exception to the Report (c): in Cases of Difficulty, the Master seldom takes upon himself to decide intricate Questions of Title, he usually directs the Abstract to be laid before a Conveyancer, upon whose Opinion the Master exercises his own Judgment, in reporting to the Court: the original Abstract, with Instructions in writing by the Master's Clerk, to advise on the Title by the Direction of the Master under the Order of Reference, with a Copy of the Order and the Objections taken by the Purchaser, and the Vendor's Answers thereto, are taken by the Solicitor and laid before a Conveyancer, and when he has given his Opinion thereon, the Abstract must be returned to the Master's Office by the Solicitor who left it; and if the Subject Matter in Dispute should be of sufficient Importance to call for the Advice and Attendance of Counsel, Instructions and a Copy of the Abstract, with the Objections and Answers, and the Opinion given thereon must be prepared and given, usually to the Counsel if a Barrister, whose Opinion has been taken; and a Time convenient for the Attendance must be settled by the Master, which must be signified to the Parties by a Warrant taken out and served upon the respective Clerks in Court, underwritten "to proceed on the Abstract of Title *Mr. Sugden* will attend." When all the

(a) Inf. pa. 401.

(c) 1 Cox, 160.

(b) Inf. pa. 195. 346.

Observations, and the Arguments thereon have been heard and disposed of, the Master upon due Consideration of the Abstract will prepare a Draft of his Report, of which Office-Copies must be taken by the Solicitor for the Purchaser and the Solicitors for the Parties prosecuting the Cause; and in this Stage of the Proceeding it should be observed, that by a Rule of Practice very strictly adhered to, no *Evidence is to be received by the Master, after he has settled his Report*, of which Lord Eldon has been pleased to express his decided Approbation (a). Whatever Evidence a Suitor may have to produce, it must be brought in before the Draft of the Report is finally settled. Warrants on preparing, and Warrants to settle the Draft of the Report must be taken out and served upon the Clerks in Court for the Parties interested; and if upon the Attendance to settle the Draft, it be not varied or altered, the Master finally settles and sometimes signs the Draft, of which an Ingrossment or Transcript is made from the Draft upon stamped Paper, in the Master's Office. A Warrant *to sign the Report* must be taken out and served, as before directed, underwritten, "at which Time the Master will sign his Report:" between the Service of which and the Day appointed to sign the Report, there must be an Interval of *four clear Days exclusive* of the Day of Service of the Warrant, within which Period the Purchaser or any Party in the Cause is at liberty to bring in Objections in Writing to the Draft of the Report, and which it is *imperative* upon the objecting Party to do, if he means to except to the Report. In difficult Questions, the Master will allow a reasonable Time to bring in Objections: in *Shapland v. Smith*, Mr. Eames allowed a Fortnight to prepare Objections (b); and if Objections are regularly brought in, Warrants must be taken out on leaving, and Warrants to proceed; the Objections must be disposed of before the

(a) 7 Ves. 587. Ord. Cano.
Bca. Ed. 259.

(b) 1 Bro. C. C. 74. infr.
vol. 2, pa. 137.

Report can be signed; the Course of Proceeding will be found under the *Title Exceptions*. If Exceptions to a Report of a good Title are overruled, other Objections to the Title cannot be made; but if Exceptions are allowed, and a new Abstract of Title is delivered, farther Objections may be brought in (*a*). Where the Title is clear, but there are Terms outstanding, or Incumbrances to be got in, the Course is for the Master to report in Favour of the Title; and a Reference is then made to approve of a Conveyance; and the Question is, whether all the Parties to the latter are before the Court, and if not, those Persons must be made Parties (*b*). It has been held, that an Exception cannot be made to the Master's Report of a good Title, on the Ground that the Trustee of an outstanding Term is a Lunatic (*c*), or that the Estate is not Tithe-free (*d*): these being Questions of *Conveyance*, and not of *Title*: the Vice-Chancellor has held that if A. has a Right to call upon B. to join in a Conveyance, that is *Matter of Conveyance*; if he has no Right to call upon him, and he is a necessary Party, it is *Matter of Title* (*e*): Where upon a Reference to see if A. could make a good Title, the Master reported that he could with the concurrence of B., it was held to be a Report upon *the Conveyance* rather than upon the *Title* (*f*). Previous to the signing the Report, the Solicitor should carefully examine the Draft of the Report with the Transcript or Engrossment; and when the Period limited by the Warrant has expired, the Master will sign his Report, which the Solicitor must file in the Report-Office, from whence Office-Copies must be taken by all Parties requiring them. Before the Report can be made effective, an Order *nisi* to confirm the Report, and the usual Course of Proceeding must be taken, to make the Order *nisi* absolute; which will be found

(*a*) 4 Madd. 212.

(*b*) 5 Ves. 725.

(*c*) 16 Ves. 380.

(*d*) 1 Meri. 104.

(*e*) 1 Madd. Ch. 440.

(*f*) 1 Meri. 179.

under the Title *General Report* (a). If the Master reports against the Title, and the Report is submitted to, the Purchaser will be discharged from his Bidding: and in a Suit for specific Performance of a Contract, the Bill would be dismissed with Costs, on Motion (b). If the Master reports in favour of the Title, and no Exceptions are taken, the Purchaser should proceed to complete his Purchase: upon Application with Notice, he would be ordered to complete his Purchase, and pay in the Purchase-Money.

The Purchaser's Solicitor is intitled, and it is incumbent on him to prepare a *Draft of the Conveyance* of the Estate purchased, and to tender it to the Vendor's Solicitor, for his Perusal and Approbation (c). If Objections are made to the Draft which the Solicitors cannot decide; and neither the Decree, nor the Order, if any has been made, for Payment of the Purchase-Money into Court, authorize the Master to settle the Conveyance, an Order of Reference to the Master to settle the Conveyance, with the usual Directions for the Delivery of the Title Deeds, and attested Copies and Covenants for Production, &c., must be applied for upon Motion or Petition; the Order passed and entered, must be served upon the respective Clerks in Court, and, with the Draft of the Conveyance, (of which the Vendor's Solicitor must take an Office-Copy) left at the Master's Office, and Warrants on leaving and to proceed must be taken out and served upon the proper Clerks in Court: if the Master directs the Draft to be laid before a Conveyancer, to advise thereon, the Instruction before given in settling the Abstract of Title must be followed; and when the Master has settled the Draft of the Conveyance, an Engrossment of the Conveyance will be made in the Master's Office, his Allowance of which will be made upon the Margin of the Deeds, and his Certificate of having settled and engrossed the Conveyance, must be filed,

(a) Infr. pa. 326.

(c) Forrest, 61.

(b) 19 Ves. 351.

and an Office-Copy taken from the Report-Office; but no Warrants on preparing, or to sign the Certificate are taken out, nor any Order made to confirm it. The Solicitors for the respective Parties should attend to examine the Engrossment with the Draft, before it is executed by the Parties; and as the Order usually directs the Title Deeds, Evidences, and Writings relating to the Lot purchased, and the requisite attested Copies to be delivered out, and Covenants for Production entered into, and in Case of Dispute, to be settled by the Master: Warrants must be taken out for settling any Controversy upon these Matters, and the Master must be attended thereon. A Purchaser who cannot have the original Title Deeds, where the Estate has been sold in a great number of Lots, has been held to be intitled to attested Copies of the Title Deeds accompanying the principal Purchase, at the Expense of the Vendor, however great the Inconvenience and Expense, if there has been no Stipulation on the Subject (*a*). Court Rolls are the Title Deeds of Copyhold Estates, and a Purchaser would be affected with Notice of their Contents, so far back as a Search is necessary for the Security of the Title (*b*). Notice of a Bargain and Sale not inrolled (*c*), of a Deed not registered (*d*), or of a Judgment not docketed (*e*), will affect a Purchaser; but the Registry in Middlesex of an *equitable* Mortgage seems not to be *presumptive Notice* to a *legal Mortgagee*, there must be actual Notice (*f*).

A Purchaser cannot insist upon the Vendors establishing a Will against the Heir (*g*), though he may to perpetuate Testimony, at the Costs of the Vendor (*h*); and a Copy-

(*a*) 6 Ves. 460. 15 Ves. 176.

(*b*) 3 Madd. 186. 18 Ves. 462.

(*c*) Atk. 646. 51.

(*d*) 1 Sch. and Lefr. 102.
1 Burr. 474. 2 Bro. P. C. 425.

(*e*) 16 Ves. 419.

(*f*) Ambl. 678. Stra. 644.

(*g*) 3 P. Wms. 190. 19 Ves. 693.

(*h*) 2 Madd. Rep. 34. n.

holder may be compelled to surrender in Person, if it can conveniently be done (a).

To compel an unwilling Purchaser to complete his Purchase, the first Step on the Part of the Vendor is, to confirm the Master's Report of the Purchaser being the best Bidder (b). For this Purpose, the Plaintiff's Solicitor must apply to the Master's Office for the Report of Purchase, which he must file at the Report-Office, and take the usual Course of Proceeding to confirm the Report absolutely; and it should seem that where the Purchaser lies by, and suffers the Vendor's Solicitor to confirm the Report, it is not necessary to deliver to the Purchaser an Abstract of the Title, previous to an Application for payment of the Purchase-Money into Court (c): for the latter Purpose, an Application founded on the Report, and the Order absolute, upon Notice in Writing to the Purchaser, must be made to the Court, for an Order that the Purchaser should be directed within a certain Time, to pay into the Bank the Sum at which he has been reported the Purchaser of the Lot in question; *see Title Notices*. The Order passed and entered, must be served *personally* upon the Purchaser, a sufficient Time before the Payment is to be made, by leaving with him a Copy of the Order, shewing the original Order at the Time of Service. The Purchaser not being a Party to the Suit, a Writ of Execution of the Order would be irregular, and the Court has refused to make a Purchaser appoint a Clerk in Court (d). The Notice requires *personal* Service, and if any Difficulty should arise, the Course of Proceeding will be found in another Part of this Work (e). The Purchaser after Service of this Order, neglecting or refusing to pay in the Purchase-Money, an Affidavit of the Service of the Order for Payment, and also of the Neglect

(a) 6 Madd. 50. Coop. 138.

(b) 2 Ves. j. 335.

(c) Saunders, v. Gray, Jan.

1811. MSS.

(d) 1 Ves. j. 94.

(e) *Infra*. pa. 158.

or Refusal to pay in the Money, must be made and filed, and an Office-Copy taken to be used in Support of a Motion on Notice, for an Order that the Purchaser should stand committed to the Custody of the Serjeant at Arms (*a*), which the Court will order, and the usual Proceedings must be pursued to make the Order for Commitment absolute. In proceeding adversely, if the Purchaser should take the Report and confirm it absolutely, the Plaintiff's Solicitor previous to any Application to pay in the Purchase-Money, must deliver to the Purchaser an Abstract of the Title to the Lots purchased (*b*); and either Party may obtain an Order of Reference to the Master on the Title: if the Purchaser should not obey this Order, the Plaintiff's Solicitor must obtain the Master's Report *ex parte*; and if it be in favour of the Title, he should then give the usual Notice in Writing to the Purchaser to pay in the Purchase-Money, and to be let into possession; and upon disobedience by the Purchaser, without Objecting to the Title, the usual Course of enforcing payment must be followed. If the Purchaser confirms the Report upon the Title, or is satisfied with the Title, he may obtain an Order upon Notice to pay in his Purchase-Money, and to be let into Possession of the Rents and Profits, and the Order usually contains full Directions for settling the Conveyance and the Delivery out of the Title Deeds and attested Copies. Cases may arise, where it may be advisable for a Purchaser who has his Money lying dead at his Banker's, to pay in the Purchase-Money, and to be let into Possession, without Prejudice to any Question he may be advised to take to the Title (*c*), which in the ordinary Course of Proceeding, he would by the Terms of the Order be precluded from doing: Possession taken generally and without Stipulation, has been held a Waiver of Objections to the Title (*d*); and a Purchaser

(*a*) 14 Ves. 512.

(*c*) Coop. 95.

(*b*) Hodder v. Roffin, Mich.

(*d*) 12 Ves. 27.

1810. MSS.

going on to complete the Purchase after full Notice that he is not to have a good Title, has been held to be Matter of Notice and not of Contract, and may amount to a Waiver of the Right to a good Title, which is given him by Law, and does not grow out of the Agreement to purchase (*a*).

Before we conclude, it may be of Use to observe, that one Purchaser may be substituted for another, on the Consent of the original Purchaser, and all the Parties in the Cause (*b*), without applying for a re-Sale: but the Court will not discharge a Purchaser, and substitute another even upon paying the Money into the Bank, without an Affidavit that there is no under Bargain (*c*).

A Purchaser, upon the Application of the Plaintiff, may be discharged from his Purchase, and a re-Sale directed, if he does not proceed to complete his Purchase for an unreasonable Length of Time, even after making the Order absolute (*d*). And it seems to have been held, that a Purchaser before the Master consenting to *forfeit his Deposit*, is not bound to proceed in his Purchase (*e*). A Person reported the best Bidder, discovered before Confirmation to have been insane at the Bidding: upon an Application by all Parties, that the next best Bidder consenting, he might be reported the Purchaser, at the Sum bidden by him, the Court held *irregular*; but directed the Estate to be resold generally (*f*): so after Confirmation of the Report, a Purchaser has been discharged upon Affidavit of Imprisonment and Insolvency, and a re-Sale has been ordered (*g*); but the Purchaser of an Estate sold under an *erroneous Decree* has been discharged from his Purchase on Motion, though the Parties were proceeding to rectify the Error; and by the general Rule, that a *Suitor must pay for the Mistakes of*

(*a*) 3 Meri. 53.

(*b*) 2 Br. C. C. 391.

(*c*) 6 Ves. 515, 615.

(*d*) 14 Ves. 512.

(*e*) 1 P. Wms. 745.

(*f*) 1 Cox, 205.

(*g*) 1 Ves. and Bea. 544.

the Court, Lord Eldon seems to have inclined to an Opinion that a Purchaser so circumstanced would be entitled to his Costs (a).

When the Purchasers of any of the Lots give Notice of an Application to the Court for Leave to pay in the Purchase Money, and to be let into Possession of the Estates purchased, it may be proper to appear by Counsel on the Motion, either to oppose it, by insisting that the Purchaser ought to have the Rents only from the Quarter-Day preceding the Notice of Motion or to settle any Terms necessary on that Account; or to consent to the Application, if it should appear advisable so to do; and to pray that the Purchase Money, when paid into Court, may be laid out in the Purchase of Bank Annuities. Where the Decree directs the Money to be so laid out, and where there is no Objection to the Terms mentioned in the Notice of Motion, it may not in strictness be necessary to appear; yet it may be prudent so to do, for the Purpose of giving any Explanation which may be required by the Court, and for preventing any Trouble afterwards, since the Directions to lay out the Purchase Money will thereby form a Part of the Order under which the Money is paid into Court; and nothing further will be necessary than to sign the printed Form of a Request, at the Accountant General's Office, immediately after the Money is paid in, to have the same laid out.

Notice of Application for Payment of the Purchase Money out of Court must be given to the Purchaser, by serving him with a Copy of the Notice of Motion or Petition; and the Affidavit of Service of the Notice must state the Service upon the Purchaser: an Objection by the Latter after Acceptance of the Title, taking Possession, and Conveyances executed, that he had been served with a Writ of Right, impeaching the Title, has been overruled; the Court observing, that Recourse must be had

(a) 2 Ja. and Wa. 287.

to the Covenant in the Conveyance, as in ordinary Cases, between Vendor and Vendee (a).

The Master's General Report, concludes the Proceedings in the Master's Office, upon the Enquiries directed by the Decree; preparatory to which, the Solicitors for all the Parties should carefully examine, that all the Directions and Enquiries have been carried into Effect, and fully investigated.

Lord Eldon has laid down very broadly, that in some Way or other, the Master must so provide, as that all the Accounts, both Legal and Equitable, shall be fully taken (b).

By the standing Orders (c), "The Masters are not to return special Certificates, unless they are required so to do, or their own judgment leads them to it; their Reports are to be drawn succinctly (preserving the Matter for the Judgment of the Court) and without Recital of the Points of Reference; but in doubtful Cases they may state the Reasons which induce them so to do."

In Reports which are special, the Masters ought not to set forth the Evidence, with their Opinions upon it, but only the bare Matters of Fact, for the Judgment of the Court, as in the Courts of Law in a special Verdict, not any Part of the Evidence on either Side (d). But the Master in taking an Account may state any special Matter without an express Direction in the Decree for that Purpose (e). Where the Master stated his Disallowance of a certain Sum, not upon the Merits but on the complex Nature of the Claim, the Court held the Master right in stating his Reason for the Disallowance, though not *directed* to state *any special Matter* (f); but in References upon any special Matter, the Master must collect the Inference, he must

(a) 2 Cox, 394.

(b) 3 Meri. 302.

(c) Ord. Canc. Bea. Ed. 208.

(d) 1 Atk. 453.

(e) 2 Atk. 620.

(f) 4 Madd. 209.

draw a Conclusion upon the Facts arising out of the Inquiry: in the Instance, of a Reference to ascertain the Fact of a Person's Death, and the Report only stated the Circumstances, not drawing any Conclusion; in referring it back to the Master, *Lord Eldon* expressed his Approbation of *Lord Alvanley's* course, of *making the Master draw the Conclusion* (a). Where the Surplus to be distributed is an uncertain Sum, the Master ought to report the Shares in aliquot Parts, and not in Money (b); but the Court will not give any Opinion upon the Form in which the Master should make his Report of any Matter referred to him (c): to take Notice of any Proceeding in the Master's Office, it must be brought before the Court by the Report of the Master (d).

The Plaintiff's Solicitor in the regular Course of Proceeding bespeaks the Draft of the Report, but in Case of Delay or Neglect, any Party may call upon the Master to make his Report. When the Draft of the Report is prepared, a Warrant must be taken out and served in the usual Manner upon the respective Clerks in Court, for all Parties *active* in the Suit, underwritten, "the Master has prepared a Draft of his general Report." Copies of the Draft of the Report must be taken from the Master's Office by all Parties *who attend*, and Warrants must be successively taken out "to proceed upon, and settle the Draft of the Master's general Report." Warrants may be taken out by any Party in the Cause. Creditors or Legatees coming in under a Decree and proving their Debts or Legacies, may if necessary, obtain an Order to prosecute a Decree for an Account. (e) A great Deal of Attention is requisite in this Stage of the Cause, that the Questions which have been raised upon settling the Draft before the Master, and his Determination and Opinion thereon, have undergone

(a) 6 Ves. 605.

(d) 1 Ves. j. 69.

(b) 1 Ves. j. 295.

(e) 2 Ves. j. 165. 16 Ves.

(c) 2 Madd. Rep. 389.

235.

sufficient Consideration, and that the Proceedings in general upon the Inquiries before him, may be so stated in the General Report, that the Interests of all the Parties may be brought before the Court for Determination upon the Hearing for further Directions. In attending the Warrants to settle the Draft, the respective Solicitors must state to the Master, such Alterations, as in their Judgment they think expedient; and if any Evidence has been omitted, it must be brought forward in strictness, *before the Master has settled the Draft* of the Report; it has been determined upon serious Argument, that after the Master has settled the Draft of his Report, an Affidavit in Support of Objections to the Draft, not laid before the Master, previous to the bringing in the Objections, could not be received as Evidence: (a) and in Support of Exceptions no Evidence can regularly be admitted, which was not before the Master upon arguing the Objections (b). When all the Alterations and Objections to the Draft have been urged to the Master and disposed of, he finally settles, and sometimes signs the Draft from which the Master's Clerk makes a Transcript or Engrossment upon Paper, and the Solicitor for the Plaintiff, or for the Party taking the Report, must carefully examine the engrossed Report with the Draft settled by the Master: a Warrant to sign the Report must be taken out, under-written, "at which Time the Master will sign his Report:" between the Service of which, and the Return, there must be four clear Days, exclusive of the Day of Service, and the Warrant should be immediately served upon the respective Clerks in Court. If any Party is advised to take the Opinion of the Court, he must bring in and leave Objections in Writing to the Draft, within the four Days limited by the Warrant, and before the Master's Office closes: and it may be proper to observe for the Information of the junior Practisers,

(a) 7 Ves. 587. Ord. (b) Mosa. 191.
Canc. Bea. Ed. 269.

that unless Objections are brought in, Exceptions to the Report cannot be filed, but by special Order (a); if no Objections are left, the Master will sign the Transcript of his Report, which it should seem the Death of the Plaintiff in the Cause would not prevent him from signing (b); but in special Cases the Master will give the objecting Party Time to bring in Objections, for which Purpose a Warrant should be taken out and served before the four Days limited by the Warrant to sign the Report have expired, and upon the Attendance a reasonable Time commensurate with the Specialties of the Case will be given by the Master to prepare and bring in the Objections; if under Colour of Objecting, any improper Delay should occur, the Court will make an Order upon the Master to sign his Report forthwith (c): the Report signed by the Master *propria manu*, by the standing Orders of the Court, must be filed in the Report Office within four Days after making and signing (d): but a continued Practice seems to have reversed the Order (e); and it is sufficient if the Report be filed before it is acted upon, (f) though not filed within the prescribed Period. To make the Report effective, *an Order Nisi* to confirm the Report must be obtained upon Motion, as of Course upon producing the Office Copy of the Report filed in the Report Office: the Order, passed and entered, must be served upon the adverse Parties *personally*, if they are less in Number than six, but if six or more, on Suggestion to the Court that the Parties are numerous and live remote from each other (g), service of the Order upon the Clerks in Court will be substituted in lieu of Personal Service upon the Parties, and it must be so expressed in the Order; and upon an Affidavit that the

(a) 2 Ves. 389. 3. P. Wms.
142.

(b) 3 Ves. 197.

(c) Dick. 103.

(d) Ord. Can. Bea. Ed. 293.

(e) 1 Ves and Bea. 327.

(f) 2 P. Wms. 517.

(g) 2 Ves. j. 417.

Parties *live remote* from each other, the Court will substitute Service upon the Clerks in Court : where there were only five Defendants, upon Affidavit that some lived in the East and West Indies, and others in different Parts of the Country, an Order has been made (a). If any Party absconds to avoid Service, an Order must be obtained to substitute Service upon his Clerk in Court and Solicitor, or at his Place of Abode with one of the Family, for which Instructions will be found in another Part of this Work. (b) Any Party in the Cause may obtain the Order Nisi and confirm the Report absolutely. When there are but seven Parties in the Cause, and two or more are Plaintiffs, it is usual to move the Court in the Name of one of the Plaintiffs, to confirm the Report Nisi, on the Suggestion before stated, and that Service of the Order on the Clerks in Court for the other Plaintiff and Defendants may be deemed good Service : if no Cause be shewn against confirming the Report, after the Expiration of the eight Days limited by the Order, exclusive of the Day of Service ; upon Affidavit of Service of the *Order Nisi personally* on the Parties, or on the Clerks in Court, or as directed by an Order of Substitution ; and a Certificate in Writing by the Register upon the Order Nisi of no Cause being shewn, dated on the Day of applying for the Order absolute (c), (for which the Order should be left two or three Days previously) the Order Nisi upon Motion may be made absolute for confirming the Report, but by consent of all Parties, an Order may be obtained in the first Instance, to confirm the Report absolutely, by the one Party giving Instructions to Counsel to move for an Order to confirm the Report absolute, and the other Side appearing or giving Instructions to consent. The Order being drawn up, passed, entered and served

(a) 2 Ves. j. 417.

(c) 14 Ves. 180. 3 Swanst.

(b) *infr.* pa. 158.

upon the adverse Clerks in Court, the Cause may be set down for further Directions, in the Manner hereafter stated.

If any Party should be dissatisfied with the Master's Opinion, and take Objections to the Draft of the Report, (which must be left in Strictness within the four Days, limited by the Warrant to sign the Report, or before the Transcript of the Report is actually signed by the Master) the Party leaving them must take out a Warrant, underwritten, "The Defendant E. F. (as the Case may be) has left Objections to the Draft of the Master's General Report;" and serve the same on the Clerks in Court for all the adverse Parties. A Copy of these Objections must be taken from the Master's Office, and carefully perused, in Order to answer them on the Attendance before the Master. The Report cannot be signed until the Objections have been disposed of; and if the Party leaving them does not proceed with that Expedition which the Course of Practice allows, any other Party may take out Warrants to proceed on the Objections; they must be over-ruled, or allowed: in the latter Case the requisite Alteration will be made in the Report. When the Warrants have been attended, and the Master has fully considered his Report, he will sign it; the Solicitor must then take it away and file it at the Report Office, and obtain an Office Copy, and the Course of Proceeding hereinbefore directed for confirming it must be followed. If Exceptions to the Report are taken in Consequence of Objections having been regularly left, these Exceptions must be signed by Counsel, engrossed on Five-shilling Stamp Paper, and filed with the Clerk of the Exceptions at the Register Office, with a Deposit of Five Pounds, of which a Certificate must be taken; see Title "Exceptions," in a subsequent Part of this Work. A Petition with the Register's Certificate annexed, must be immediately presented to the Lord Chancellor, for an Order to set down the Exceptions for hearing, and a Copy of the Report and of the Exceptions, at the same time left with

the Lord Chancellor's Gentleman of the Chamber, with a Fee of Five Shillings, or the Copies may be left by the Exceptant three or four Days before the Exceptions come on to be heard. The Order must be drawn up, passed and entered, and served upon the adverse Clerks in Court within the eight Days mentioned in the Order Nisi to confirm the Report, and the Exceptions must be set down with the Register before the four Days limited by the Order have expired: it is imperative upon the Excepting Party *to set the Exceptions down for hearing*; the mere filing Exceptions and making the Deposit will not prevent the Register from signing his Certificate of no Cause being shewn. Upon the usual Application to make the Order Nisi for confirming the Report absolute, and which the Court will grant (a), either Party may obtain the Order to set them down (b); but if the Exceptions are filed after the Report has been confirmed absolute, they will be ordered to be taken off the File (c). No Exceptions to a Report will be allowed, if they vary from, or are not founded on Objections, in those References, where by the Course of Proceeding, a Draft of the Report is prepared, to which Objections will lie: a Work of great Practical Information lays down the Rule, that where the Master by his Report finds a Fact, and his Judgment is founded on Evidence, he delivers out a Draft of his Report before he signs it, to give the Parties an Opportunity to take Objections, without which, (unless by Special Order) they are precluded from doing (d); and the Court has decided that Exceptions must be founded upon Objections brought in before the Master (e); but this Rule has given way to Circumstances. If by *Accident* or *Surprise*, Objections have not been carried in upon the Warrant to settle the Report, the Court has al-

(a) Dick. 604. 730. 4 Ves.

(c) Coop. 271.

617. 2 Cox. 169. 1 Ja. and
Wa. 670.

(d) Dick. 732. Prac. Reg.
Wy. Ed. 380.

(b) 4 Ves. 617.

(e) 2 Ves. 389. 4 Madd 28.

VOL. I.

lowed the Party to file Exceptions (*a*) ; and where a special Case has been made out, Leave has been given, upon Payment of Costs, to file Exceptions, though no Objections have been brought in, and the Report has been confirmed nisi (*b*) : upon Application to file Exceptions, where Objections had not been left with the Master, if the Court see Reason to be dissatisfied with the Report, the Master has been ordered to review his Report, and the Parties have been at Liberty to take Objections ; but it should seem that the Application should be by Motion and not by Petition (*c*) : and after Exceptions have been argued, and the Report confirmed, Leave has been given to re-argue the former Exceptions, and to take *new* Exceptions as to one Subject of Enquiry, to come on at the same Time, and that the Master should review that Part of his former Report (*d*) : upon arguing the Exceptions, no Evidence is admitted in support of them but what was laid before the Master upon the Objections to the Draft (*e*) : and the like Rule holds as to Affidavits subsequent to the Report (*f*). Where the Error in a Report is owing to a Party not laying a material Piece of Evidence before the Master, the Court will not give Leave to *review* the Report, but upon the Exceptant giving up the Deposit (*g*). The Exceptions being set down to be argued in Court, a Brief must be given to Counsel, with a Copy of the Report and Exceptions, and the Court attended while the Exceptions stand in the Paper for Argument : on the Hearing, if the Exceptions should be disallowed, and an Order made to confirm the Report, the Cause may be set down for hearing on further Directions immediately ; but the Exceptions do not prevent the Cause being set down for further Directions ; sometimes the Excep-

(*a*) 3 Madd. 439.

(*b*) 1 Madd. Rep. 555.

(*c*) Dick. 290. 2 Madd. 186.

(*d*) 1 Ves. 189. 1 Swanst.
158. n.

(*e*) Primrose v Bromley.

Mich. 1739. MSS. Mose 191.

(*f*) 2 Atk. 20.

(*g*) 2 Atk. 408. 3 P. Wms.
141.

tions and further Directions come on together (*a*). And upon further Directions, where no Objections had been taken to the Draft of a Report, which had been confirmed, the Court ordered the Cause to stand over with Liberty to file Exceptions as if Objections had been brought in (*b*); and sometimes the Master is ordered to review his Report to let in Objections after the Report has been confirmed (*c*); but it is not competent to the Lord Chancellor to order the Master to review a Report confirmed and followed by a Decree of the Master of the Rolls, while that Decree stands (*d*). If on Argument the Exceptions are overruled, the Deposit is usually directed to be paid to the other Party, and sometimes with further Costs beyond the Deposit, to be taxed by the Master (*e*); but where some of the Exceptions are allowed, and some overruled, the Court exercises its Discretion with respect to the Deposit, and divides it between the litigating Parties (*f*). And if the Excepting Party sets down Exceptions, and does not appear to support them, they will be overruled, with Costs, to be taxed beyond the Deposit; but to entitle the other Party to such Costs he must show by Affidavit that he was served with the Order for setting them down (*g*). And the Deposit is sometimes divided between the adverse Parties (*h*); where some Exceptions are allowed and some not, and others waived, the Court in its Discretion may order the Deposit to be divided (*i*). If the Court allows any of the Exceptions, it will be referred to the Master to review his Report, and the Exceptant will be entitled to a Return of the Deposit of

(*a*) 5 Ves. 424.

Be. Ed. 460. Beam. Costs.

(*b*) Dick. 362. 1 Swanst. 227.

157. n.

(*f*) 4 Madd. 39.

(*c*) 1 Swanst. 156. Dick. 313.

(*g*) Elliot v. Booth. Trin.

(*d*) 1 Swanst. 154. 1 Wils. 1802. MS.

C.C. 471.

(*h*) Ibid.

(*e*) 12 Ves. 166. Ord. Canc.

(*i*) 2 Madd. Rep. 184.

Five Pounds (*a*). The Order must be drawn up, passed, and entered, and left with the Master, and Warrants must be taken out for him to review his Report, in which he will make the necessary Alterations. The Report being signed and filed, the usual Orders must be obtained for its Confirmation, in the Manner before directed, and the Cause is then in a State to have the further Directions of the Court on the Master's Report.

But it is more usual for the Party interested in the Cause, and desirous of an expeditious Decision of any Question arising in it, to procure the Cause to be set down for further Directions, to come on to be heard with the Exceptions taken to the Report: (*b*) this is done by a Petition left with the Lord Chancellor's Secretary; (for the Form, see Title "Petitions.") The Directions of the Court will then be given on the whole View of the Matter, and the Facts and Circumstances as they appear from the Report and Exceptions (supported by the Evidence in the Cause,) and a great Deal of Time may be saved; for if the Master is right in his Report, and the Exceptions should be overruled, the further Directions of the Court will be immediately obtained by the Order made thereon; and so in very many Cases, even where the Exceptions are allowed.

The Hearing on further Directions, or on the Equity reserved, after the Master's General Report, or after the Trial of an Issue, or Action at Law, or upon a Certificate of the Judges on a Case directed for the Opinion of a Court of Law, may be either in Court, or at the Rolls. A Cause cannot be set down on a separate Report (*c*).

The Course of Practice is, to present a Petition to the Lord Chancellor, or to the Master of the Rolls, before whom the Cause is intended to be heard, not regarding where the former Decree was made, though inconvenient(*d*); (see Title "Petitions:") and at the same Time to leave

(*a*) 4 Bro. C.C. 1. 2 Cox. 169.

(*c*) 3 Meri. 430.

(*b*) 5 Ves. 424.

(*d*) 11 Ves. 53.

with the proper Secretary a Copy of the Decree, and of the Master's Report, and a Fee of Five Shillings to the Secretary: and when the Petition is answered, a Fee of Twenty Shillings is paid to the Lord Chancellor's Secretary, or Twelve Shillings and Sixpence to the Secretary at the Rolls, if set down before his Honour. The Petition must be left at the Register Office, and the Order for setting down the Cause drawn up, passed, and entered there, and a Copy served on the Clerks in Court for the respective Parties. And it may be useful before the Order is taken away, to attend at the Register Office to the setting down the Cause in the proper Course for hearing, for which on further Directions *only* One Shilling is paid; for Costs and further Directions Two Shillings; and an Affidavit of Service of the Order should be made and filed, and an Office Copy taken to read in Court on the Hearing, in case the adverse Party does not appear. It should be remembered, that either Party (after the Report is confirmed) may petition to set down the Cause for further Directions and Costs, but it is usually done by the Party who is most interested in obtaining a speedy Decision.

The Cause being entered in the Register's Book of Causes, to be heard in its Course, for further Directions, a Brief for Counsel must be prepared, stating shortly the ordering Part of the Decree, and the Master's Report made in pursuance thereof, and it may be accompanied with the Directions to be obtained at the Hearing, and such Observations on the Case as may be necessary to draw the Attention of the Counsel to the Points which have been agitated in the Cause, either at the Time of the Decree being made, or in the Proceedings before the Master; and the Counsel should have his former Brief on the Hearing. While the Cause is in the Paper, the Solicitor should attend, and on the Hearing be particularly careful that all the proper Directions are given; for should any be omitted, the Register may not afterwards take

upon himself to supply such Omissions without the Order of the Court for that Purpose, which cannot be obtained without a Petition, or a Motion to correct the Minutes, or possibly a Re-hearing of the Cause on further Directions, either of which Proceedings will occasion a great Loss of Time, as well as be attended with a considerable Expense. The Minutes of a Decree made by his Honour at the Rolls can be varied or altered only by Petition, and not by Motion.

On the Hearing of the Cause upon further Directions, it will be necessary to be prepared with a Certificate of the State of the Money and Funds from the Accountant-General, which must be bespoke at his Office a few Days before the Cause is expected to be heard.

The Cause having been heard on further Directions, the Senior Counsel's Brief, the former Decree, and Master's Report should be left with the Register, and Minutes of the Order made thereon bespoke at the Register's Office, and the Minutes of the Order drawn up by the Register, of which the other Side usually take Office Copies, and a Time must be appointed by the Register for settling the Minutes, of which Notice in writing must be given to the Solicitor, by the Party prosecuting the Decree: if any Difficulty occurs, an Application must be made by Motion on Notice, or by Petition, to vary or alter the Minutes of a Decree made by the Court, or by *Petition*, if made at the Rolls, for which Instructions will be found in another part of this Work (*a*); when the Minutes are finally settled, the Register will draw up the Decree, and the Solicitors for all Parties interested in prosecuting the Suit take Office Copies; after which, an Appointment must be made by the Register for passing the Decree, of which, as laid down in a Work of Authority (*b*), the Register requires the Solicitor drawing up the Decree to

(*a*) *Infr.* p. 317.

(*b*) 2 Cox. 206.

give Notice in Writing to the other Side, and generally, unless the Register has an Assurance that the Notice is given, he will not pass it *ex parte*. The Solicitors for all Parties should attend the passing, but unless the Office Copies are paid for, their Attendance is regarded as a Nullity. In adverse Suits, this requires very strict Attention, and in a Question of Costs, irretrievable Injury might be occasioned. If any Imposition should be practised upon the Register, an immediate Application to the Court should be made previous to the next Proceeding, to enter the Decree in the Office-books of the Register; if through any Delay or Refusal the Decree when passed should not be left to be entered, the Course of Proceeding has already been considered. (a).

The Court upon the Hearing for further Directions, may *add* anything to a Decree; if Interest on a Debt be not given by the Decretal Order of Reference, or not reserved, it is strictly Matter of Re-hearing, but where the Point has been made upon the Cause coming on for further Directions, it has been given (b): under the usual Decree, for an Account against an Administratrix, on bringing on the Cause for further Directions, a Reference to the Master, to inquire into the Balances in Hand from Time to Time, for the Purpose of charging Interest, was directed, but refused on Petition, though supported by Affidavits of gross Misconduct (c); to *alter* the Decree, itself, the Cause must be re-heard (d), unless it be a Charity Case (e); an Order made upon farther Directions is a Decretal Order, and cannot be discharged on Motion, and its being by Consent, makes no Difference: and it should seem that anything inserted in the Order, as by Consent, to which the Party had not consented, must be rectified by a Re-

(a) Infr. p. 318.

(c) 14 Ves. 502.

(b) 4 Bro. C. C. 318. 2

(d) 13 Ves. 394.

Ves. j. 36. 164. Ambl. 584:

(e) 11 Ves. 241.

hearing, or by Bill of Review, and not by Motion (*a*) : and where further Directions have been reserved until after a Trial at Law, and Report, and the Latter has become useless from a Verdict on the Trial, a Petition to set down the Cause for farther Directions, or such other Order as the Court should think proper, has been dismissed, though the Parties could not proceed (*b*) ; but in Cases where the Master states by his Report, that he cannot take the Account which the Court has directed, this has been considered as the Subject of farther Directions, rather than of Exception to the Report (*c*) ; and if the whole Matter appears on the Report, a Question decided by the Master is open on the Hearing for farther Directions without taking Exceptions to the Report (*d*) ; where a Bill is retained with Liberty for the Plaintiff to bring an Action at Law, and in Default of his doing so, the Bill to stand dismissed with Costs, if the Plaintiff does not try his Action, the Bill is not *ipso-facto* dismissed, the Cause must be either set down for farther Directions, or, according to a subsequent Decision, an Order may be obtained to dismiss the Bill with Costs (*e*). Further Directions may be given by Motion where the Reference to the Master is by Motion ; as in the Instance of a Reference of Title, the Report excepted to, and allowed, a Motion to dismiss was held to be Regular (*f*) ; on a separate Report, a further Order for consequential Directions must be by Petition (*g*).

HILARY TERM, 1822.

The Decree made on further Directions being passed and entered, a correct Copy of the Title and ordering Part must be left at the Master's Office, and examined by

(*a*) 1 Vcs. j. 93.

(*b*) 1 Vcs. j. 153.

(*c*) 15 Ves. 436.

(*d*) 6 Ves. 226.

(*e*) Dick. 654. 2 Cox.
374.

(*f*) 6 Madd. 3. 19 Ves. 351.

(*g*) 3 Madd. 430.

his Clerk with the Decree, and the Directions carried into effect. If Provision is made by the Decree for Payment of the Costs up to the Hearing out of the Funds standing in the Accountant-General's Name, by Sale of a sufficient Part of any Stock or Fund in the Cause, the Order and Report must be taken to the Register at whose Seat the Order was drawn up and passed, to obtain his Certificate to the Accountant-General for Sale of the Stock directed to be sold for Payment of the Costs; the Certificate must be left with the Order and Report at the Accountant-General's Office, with Instructions to sell sufficient of the Stock to pay the Costs; when the Sale has been made, and the Solicitor receives the Costs, he signs a Receipt for them in a Book at the Accountant-General's Office, and receives a Draft or Check on the Bank of England for the Amount; the Certificate of the Payment must be filed in the Report Office; for filing the Certificate Seven Shillings and Sixpence is paid, and the Draft or Check must be marked "Entered" by the Clerk there, and afterwards taken to one of the Registers, who on a Perusal of that Part of the Report which ascertains the Amount of the Costs, and of the Order which directs the Payment, will countersign the Check, which is then taken to the Chancery Department at the Bank, opposite to the Secretary's Office; the Clerk will examine the Draft with the Office Books, and mark the Draft with the Folio of the Account; the Draft must afterwards be taken to the Chancery Office (near the Discount Office,) at the Bank, from whence the Clerk will give the proper Tickets and Directions to the Cashiers and Tellers, sitting in the Great Hall at the Bank, to pay the Amount in Notes or Cash, as the Solicitor may choose; but he is not obliged to attend personally at the Bank for Payment, the Check may be indorsed, and the Money will be paid to the Bearer. No further Instruction is necessary for receiving the Accountant-General's Draft at the Bank, unless it

be to receive it within one Month from the Date, as expressed in the Draft.

The above Instructions will serve for the Receipt of any Sum from the Accountant-General, directed by an Order founded on a Report, to be paid to any Person whatsoever, the Manner of procuring this Payment being the same in every Instance.

In transacting the Business at the Accountant-General's Office, it must be always remembered, that wherever a Transfer or Sale of Bank Annuities, or any other Stock or Fund in the Cause, is to be made, pursuant to any of the Directions in a Decree or Interlocutory Order, a Certificate must be obtained from the Register, and left with the Accountant-General, without which he cannot make a Transfer or Sale; but for the Payment of Money a Certificate from the Register is not required. There is another Distinction, which it may be necessary for the Solicitor to attend to, viz. that where a Sum of Money is paid by the Accountant-General pursuant to an Order, from whatever Fund the same may be paid, he gives a Certificate with the Check, which must be filed at the Report Office; but where the Payment is Interest accruing on the Fund, it is paid half-yearly or otherwise, as suits the Convenience of the Person entitled to receive it, but no Certificate of the Payment is filed, although the Draft or Check, as well as every other Draft or Check given by the Accountant-General on the Bank, must be entered at the Report Office, and countersigned by one of the Registers, otherwise, when it is presented at the Bank, Payment will be refused.

On all Claims which have been proved before the Master, allowed by him, and stated in his Report, and which in their nature bear Interest, the Court will direct a Computation of subsequent Interest to be made, and probably Part of the Directions in the Order made on further Directions will be, that the Master shall be at

liberty to make a separate Report thereof. The Claimant must therefore carry in before the Master his Charge of subsequent Interest, computing it from the Period mentioned in the former Report to the Time when the Debt and Interest are likely to be paid, pursuant to that Part of the Order which directs the Payment thereof.

If Stock is directed to be transferred to a Party in the Cause, on his executing a Release or Conveyance of any Estate to be settled by the Master, and the Parties differ, a Draft of the Release or Conveyance must be prepared, and left with the Master, who usually directs it to be laid before some eminent Conveyancing Counsel, for his Perusal and Approbation, on the Behalf of all Parties ; but if insisted upon, the Master is obliged to settle the Draft. To save Time and Trouble, the Draft may be so settled before it is left with the Master (first procuring his Approbation of a Counsel before whom they are to be laid.) This Draft, when settled, must have the Signature of the Counsel, testifying his Approval thereof ; and may then be left with the Master, and a Warrant upon leaving taken out and served upon the respective Clerks in Court. After a sufficient Time allowed for Copies to be made, for such Parties in the Cause as require them, successive Warrants to settle the Draft of the Conveyance must be taken out, and attended until they are settled. The Master's Clerk will then engross the Deeds, and procure the Master's Certificate, or Report, of his Approval and Allowance, and deliver them to the Solicitor, and the Master will sign his Allowance upon each Skin. The Report must be filed, and an Office Copy taken.

When the Deeds have been properly executed by all necessary Parties, an Affidavit of the due Execution must be made and filed in the Master's Office, and an Office Copy taken, (for the Form, see Title "Affidavits") which being done, and proceeded upon before the Master, he makes his Report certifying the due Execution, which

being filed, and an Office Copy taken, the Money directed to be paid in consequence thereof may be procured ; for this Purpose, the Order for Payment of the Money, the Office Copy of the Master's Report of his Allowance of the Deeds, and the Office Copy of the Report of the due Execution thereof, must be left with the Register who drew up the Order, who will give his Certificate to the Accountant-General for Sale of the Fund, for Payment of the Money directed on the Execution of the Deeds ; which Certificate, together with Reports and Order, must be left with the Accountant-General, who on Perusal thereof and finding no Error, will give Directions to his Broker for the Sale, and a few Days after will make the Payment to the Person entitled thereto by a Draft or Check on the Bank ; he will also give a Certificate thereof to be filed at the Report Office, where the Draft being marked *Entered*, and the Certificate filed, the Register upon production of the Report and Order, will countersign the Draft, which will afterwards be paid at the Bank. If the Money to be paid on the Execution of the Deeds is not to be raised by the Sale of Stock, but paid out of an aggregate or specific Sum standing to any particular Account, in or to the Credit of the Cause, in that Case a Certificate from the Register is not required ; but the Reports, and Order, must be left with the Accountant-General, who will make out a Draft upon the Bank for the Money directed to be paid, and also a Certificate ; the Register however will, on countersigning the Draft, require the Reports and Order to be shewn to him.

But where the Court directs Money to be paid by the Accountant-General, and that the Release which is to be executed by some of the Parties should be settled by the Master in case the Parties differ about the same, the Accountant-General may refuse to pay the Money unless

the Release has been settled by the Master, although all the Parties interested attend him and give their Consent; in such Case, an Order must be applied for by Consent of all Parties, directing the Accountant-General to pay the specific Sum mentioned in the Order for which the Release has been executed pursuant to the Decree or Order (*a*). And so where a Legacy was ordered to be paid to a Legatee, who died leaving an Executrix and two Executors, and the Accountant-General refused to pay the Legacy under a Power of Attorney without a Discharge from the Executor of the deceased Executor, upon Application to the Court an Order was made to pay the Legacy to the surviving Executors (*b*); and a like Order was made for Payment of a Legacy to a Person having a *general* Power of Attorney, without any Authority specifically to receive the Legacy in question (*c*).

If any Balances remaining in the Hands of the Defendants the Executors are not paid into Court in a reasonable Time after the Order directing the Payment has been obtained, Application should be made by Motion to the Court, for an Order upon the Defendants to pay in the same within a Time specified; Notice of this Application should be duly served on their Clerks in Court, (see Title "Notices of Motion;") an Affidavit of the Service of the Notice must be made and filed, and an Office Copy taken, to be read in Court on the Motion being made; a Certificate from the Accountant-General that the Balances have not been paid in must also be obtained, and the Court on the Motion, will make an Order for Payment pursuant to the Notice of Motion, or grant such longer Time, as may appear sufficient. The Order must be drawn up, passed, entered at the Register Office, and served on the Clerks in Court for the Defendants who are ordered to pay in the

(*a*) Elliot v. Booth, Michaelmas, 1802. MSS.

(*b*) 6 Madd. 107.

(*c*) 2 Cox. 390.

Decree, though a Receiver be no Part of the Relief prayed and all Matters are reserved by the Decree (*a*) ; and where an Infant is Plaintiff, although the Appointment of a Receiver forms no Part of the Prayer (*b*) : the old Rule not to appoint a Receiver *before Answer*, was broken through by Lord Kenyon, (*c*) and the Order then made for the Appointment of a Receiver *before Answer* has been followed since, when Justice requires it, and the Merits appear by Affidavits, which the Court allows to be read, and as Lord Eldon has observed, considers as tantamount to an Answer (*d*). In a Suit by an Infant on the Filing of the Bill instantly, and before *Process served* where the Defendant had absconded, and was in Contempt upon a former Suit, a Receiver has been appointed (*e*) ; and where it appears from the Answer that the Real Estate must be responsible, there being no Personal Estate to be first applied towards Debts, a Receiver will be granted in the first Instance, (*f*) but it is not usual to appoint a Receiver before Appearance, or Answer, though there are Instances where the Court has interposed, and appointed a Receiver *before Answer*, upon a Defendant's Affidavit shewing, as Lord Eldon has remarked, an equitable Title in the Plaintiff (*g*) ; and in Cases of *Fraud*, combined with Danger to the Property, if the immediate Possession be not taken under the Care of the Court, by prompt Relief (*h*) : as in the Instance of a Defendant absconding, to avoid being served with Process. (*i*) In Cases of *Misconduct, Waste, or improper Disposition* of Assetts by an Executor, the Court will instantly interfere, and appoint a

(*a*) 3 Atk. 690.

(*e*) 1 Atk. 489. 578. 2 Atk.

(*b*) Simpson v. Gutteridge,
2 Madd. Ch. 234. 1 Atk.
489.

315. Dick. 580.

(*f*) 8 Ves. 71.

(*g*) 1 Ves. and Bea. 183.

(*c*) 2 Bro. C. C. 158. 6 Ves.
738.

(*h*) 13 Ves. 107. 266. 16
Ves. 59. 6 Ves. 738. 2 Bro.

(*d*) 18 Ves. 283. 1 Meri.
738.

C.C. 158. Cowp. 152.

(*i*) 1 Ball. and Bea. 75.

Receiver, (*a*) and the Bankruptcy of an Executor and Trustee, though with the Knowledge of the Testator, (*b*) the mere Ground that an Executor is in mean Circumstances or poor, (*c*) has not been held sufficient, but the Absence of the Husband of an Executrix abroad, and not amenable to the Process of the Court, has been held sufficient to appoint a Receiver (*d*). In a Suit depending in the Ecclesiastical Court, to recall a Probate, a Receiver has been appointed before Answer, and without Notice (*e*); the Jurisdiction of the Court of Chancery pending a Dispute in the Spiritual Court, to protect the Property by a Receiver, is not ousted by the Power of the latter Court to appoint an Administration *pendente lite*, (*f*) but the mere Ground that two Wills are in controversy, and no Suggestion that the Property is in Danger, and cannot be secured by Administration *pendente lite*, is not of itself sufficient to appoint a Receiver (*g*): and so upon an Allegation that the Defendant opposes the Plaintiff's Application for Administration, without stating the Grounds, and where nothing appears to shew that Administration could not be obtained in due course, the Court will not interfere (*h*); if Probate has been granted, no Administrator *pendente lite* can be appointed; but if appointed, pending a disputed Administration there, to protect the Property a Receiver has been appointed (*i*); but if the Court appoint a Receiver upon the Ground that the Property must *in Part* remain unprotected, the Party applying, must state the Suit depending, and be interested in the Result (*k*). Upon the Bill of a Purchaser, pending a Suit instituted by the Wife of the Vendor, claiming under a

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| (<i>a</i>) 4 Bro. C. C. 277. 2 Ves. j. 98. | (<i>f</i>) 2 Ves. and Beam. 85. 96. |
| (<i>b</i>) 5 Madd. 46. | (<i>g</i>) 1 Ves. 324. 6 Ves. 172. |
| (<i>c</i>) 2 Atk. 126. 12. Ves. 4. 1 Madd. Rep. 142. | 12 Ves. 462. |
| (<i>d</i>) 2 Atk. 213. | (<i>h</i>) 3 Madd. 1. |
| (<i>e</i>) 1 Ves. 324. 12 Ves. 462. | (<i>i</i>) 8 Ves. 71. |
| | (<i>k</i>) 3 Meri. 175. |

Settlement after Marriage, and therefore voluntary, a Receiver has been appointed before Answer (*a*); so after Answer, in a Suit by the Vendor, upon the mutual Lien for the Remainder of the Purchase Money, or Deposit and a mixed Possession, the Vendor by his Answer, admitting Insolvency and an Intention to sell or convey (*b*); and if the Purchaser of a legal Estate in Land, subject to an equitable Rent Charge, refuses to pay it, a Receiver will be appointed (*c*); but not where the Matter in Dispute depends on a mere legal Title, unless a strong Ground of Title is shewn, and that the Rents are in Danger (*d*); an Application for a Receiver against the legal Estate, upon the Effect of Evidence before Hearing, has been refused (*e*); a Receiver ought not to be appointed where there is a Trustee with Power of Entry and Distress (*f*): but upon the Application of all Parties interested, a Receiver will be appointed, if any of the Trustees refuse to Act; where of four Trustees two refused to act, upon Consent before Answer, a Receiver was appointed (*g*); in a Suit by Creditors against an infant Heir, for Sale of real Estate, and the Parole demurs, a Receiver will be appointed (*h*); and in a Suit by an Heir to controvert a Title, unless there are special Circumstances, the Court will not interpose by a Receiver (*i*); but one Tenant in common after a Bill filed, may move that his Co-Tenant in Possession may give Security for his Share of the Rent, or that a Receiver may be appointed (*k*), but the Affidavits in support of the Application must make out a Case of Exclusion (*l*). A Receiver has been appointed of a

(*a*) 18 Ves. 180.

(*b*) 2 Ves. and Bea. 125.

(*c*) 1 Meri. 54.

(*d*) Ambl. 311. 13 Ves. 105.

(*e*) 3 Meri. 697.

(*f*) Coop. 41.

(*g*) 3 Meri. 695.

(*h*) 1 Cox. 433. Dick. 696.

(*i*) 1 Ves. 321.

(*k*) 4 Bro. C. C. 414. Dick. 800.

(*l*) 2 Meri. 405.

Lunatic's Estate, where no one would act as Committee (*a*). And also of an Estate in the East Indies; the usual Course is to appoint a Person within the Jurisdiction of the Court, and he appoints some Person his Agent in India (*b*).

In Partnerships, the Court will interfere by a Receiver, to wind up and dispose of the Concern, but not to carry it on (*c*); nor while a Trade is going on, unless upon very gross Abuse (*d*). If a Copartnership is admitted or established, a Receiver may be appointed of the outstanding Estate, and each Party restrained from receiving the Partnership Effects (*e*); a Receiver will not be appointed merely on the Dissolution of a Partnership, but only on the Breach of Duty of the Partner, or of the Contract, by continuing the Trade on the separate Account with the Partnership Effects (*f*); where some Members of a Partnership, either in the ordinary Course of Trade, or in closing the Transactions after a Dissolution, seek to exclude others from a just Share in the Management, a Receiver will be appointed (*g*); and so in mining Causes, in which several are interested, from its nature being a Species of Trade, and not a mere Tenancy on the Land (*h*). Where there is a Partnership, there is a Confidence between the Parties, and if one dies, no Receiver will be appointed (*i*); nor will the Court on Motion appoint a Receiver, unless it appears that the Plaintiff will be entitled to a Dissolution at the Hearing (*j*); on a mining Concern, upon a Claim of Partnership in the equitable Interest not raised,

(*a*) 1 Ja. and Wa. 639.
10 Ves. 622.

(*b*) 2 Madd. Ch. 191. 15
Ves. 91.

(*c*) 15 Ves. 10. 2 Ves. and
Bea. 329.

(*d*) 2 Anstr. 453. 2 Meri.
406.

(*e*) 16 Ves. 57.

(*f*) 18 Ves. 281.

(*g*) 1 Wils. C. C. 234. 1
Swanst. 481.

(*h*) 1 Ja and Wa. 298.

(*i*) 2 Bro. C. C. 272.

(*j*) 1 Ja. and Wa. 589.

until the Concern, at a heavy Expense, had become prosperous, and denied by the Answer, a Receiver will not be appointed (*a*).

If a *Mortgage* appears on the Face of the Pleadings, a Receiver will not be appointed unless the Mortgagor is brought before the Court (*b*); nor if the Mortgagee has the legal Estate (*c*); so if the Mortgagee be in Possession as against him, a Receiver will not be appointed without his Consent (*d*), except upon Confession that he has been paid off, or refused to accept what is due: Mismanagement of the Estate, or Misapplication of the Rents, or even Collision with the Mortgagor, are not Grounds *before Answer* to take the Possession from him (*e*): but if the Mortgagee has been negligent in his Accounts, and cannot swear what is due, a Receiver will be appointed (*f*); but it may be proper to observe, that although he cannot state precisely what is due, if he swears that a Sum of Money is due, and that his Mortgage is not satisfied, the Court will not interpose (*g*); where a Mortgagee is not in Possession, a Receiver may be appointed at the Instance of Creditors, or of a subsequent Incumbrancer, without Prejudice to the Right of the first Mortgagee to obtain Possession (*h*). A Receiver appointed by the Court is appointed on behalf of all Parties (*i*); an equitable Mortgagee may apply for a Receiver (*k*); and in favour of equitable Creditors, or of Persons having equitable Estates, a Receiver will be appointed on Motion, so as not to disturb prior Equities, if it be shewn that such Relief will be

(*a*) 19 Ves. 144.

(*b*) Coop. 31.

(*c*) 1 Ja. and Wa. 647.

(*d*) Dick. 608. 2 Cox. 378.

(*e*) 1 Ja. and Wa. 647.

(*f*) 10 Ves. 377. 16 Ves.

(*g*) 13 Ves. 377.

(*h*) 1 Cox. 422.

(*i*) 2 Swanst. 118. 2 Ball

and Be. 55.

(*k*) 19 Ves. 628.

given by the Decree, without Prejudice to prior legal Creditors, with Leave of the Court (*a*), acting against the Estate at Law (*b*). Upon an Agreement to secure an Advance of Money by Mortgage, and a Bill filed for a specific Performance, a Receiver has been appointed before Answer (*c*); and pending a Reference of Title, on the Motion of the Vendor (*d*): and at the Instance of Creditors, pending a Question of Validity of the Assignment of the Profits of an Office (*e*).

The Course of Practice to appoint a Receiver may be by Petition or by Motion, usually upon Notice (*f*). *Lord Eldon* has thought it dangerous ever to appoint a *Receiver ex parte* (*g*). The Application must be for an Order of Reference to one of the Masters of the Court to appoint a proper Person to be Receiver of the Rents and Profits, or Produce, &c. of the Estates or Property in question in the Cause.

To support the Application, a short Statement by way of Brief of the Pleadings, with proper Instructions as to Facts and Circumstances, must be given to Counsel; and in some Cases, an Affidavit of the special Facts, and other incidental Circumstances may be required, which must be filed, and an Office Copy taken to read in Court when the Motion comes on, but Affidavits are not admitted in Support of a Motion for a Receiver against the Answer, except in the Case of Waste (*h*); but if the Answer is not filed until the Day for which the Notice of Motion is given, and the Plaintiff is prevented from making it, an Affidavit in Support of the Motion is allowed to be read, and the Answer is then considered as a Counter-Affidavit (*i*). If upon Hearing, the Court should make the Order,

(*a*) 2 Swanst. 137. 1 Cox

(*e*) 3 Swanst. 173.

422.

(*f*) Madd. Chanc. 188. and

(*b*) 2 Wills. C. C. 151. 2 the Cases cited.

Swanst. 132.

(*g*) 1 Coop. 42.

(*c*) 4 Madd. 463.

(*h*) 19 Vcs. 144.

(*d*) 2 Ja. and Wa. 236.

(*i*) 1 Ja. and Wa. 589.

the Counsel's Brief must be left with the attending Register, and the Order drawn up, passed, entered, and served upon the adverse Clerk in Court, if an Appearance has been entered.

The Order directs the Master "to appoint a Receiver of
 " the Rents and Profits of the Estates in question, and to
 " allow him a Salary for his Care and Pains therein, such
 " Person to be appointed Receiver first giving Security, to
 " be allowed of by the Master, and to be taken before
 " a Master Extraordinary in the Country, if there shall be
 " Occasion, duly and annually to account for what he shall
 " so receive, and to pay the same as the Court shall
 " direct. And the Tenants of the Estates are to attorn
 " and pay their Rents in Arrear and growing Rents to
 " such Receiver, who is to be at Liberty to let and set the
 " Estate with the Approbation of the Master, as there
 " shall be Occasion, and that the said Receiver do pay the
 " clear Balance of his Account from Time to Time into
 " the Bank, with the Privity of the Accountant-General,
 " to be placed to the Credit of the Cause."

To carry this Order into effect, the original Order passed and entered must be left at the Master's Office to whom the Reference is made; and the Person intended to be appointed Receiver must be properly described by a Proposal in the following Form, left at the Master's Office, and a Warrant taken out and served upon the adverse Clerk in Court, underwritten, "the Plaintiff (or Defendant) hath left a Proposal for appointing a Receiver of
 " the Rents and Profits of the Estates in question in this
 " Cause." And Warrants "to proceed upon Plaintiff
 " (or Defendant's) Proposal for a Receiver," must be taken out, served and attended until the Proposal is allowed or rejected.

The Proposal may be in the following Form:

" In Chancery.

" Between (*State the Title of the Cause.*)

" The (Plaintiff or Defendant) proposes G. B. of Mid-

“ dlewich, in the County of Chester, Esq. to be the Re-
 “ ceiver of the Rents and Profits of the Estates *in the*
 “ *County Palatine of Chester*, in the Pleadings in this
 “ Cause mentioned.

“ And the said G. B. proposes Mr. C. of Middlewich
 “ aforesaid, Banker, and T. V. of Knutsford, in the same
 “ County, Esq. to be his Sureties.”

A State of Facts, or an Affidavit with a Rental in the Form of a Schedule, must be brought in (a), and an Affidavit of the Sufficiency of the Sureties, each of whom must swear that he is worth double the Amount of the yearly Rent of the Estates in question, the latter of which is prepared in the Master's Office, generally in the following Form :

“ In Chancery.

Between (*State the Title of the Cause.*)

“ W. C. of, &c. and T. V. of, &c. severally make Oath
 “ and say, and first this Deponent W. C. for himself,
 “ saith, that he is worth the Sum of 2000*l*. (double the
 “ Amount of the yearly Rent of the Estates) after all his
 “ Debts are paid. And this Deponent T. V. for himself
 “ saith, that he is worth the Sum of 2000*l*. (as before)
 “ after all his Debts are paid.”

The Proposal for appointing a Receiver and his Sureties being allowed, or opposed by a counter-Proposal brought in by the adverse Solicitor, the Master must decide upon the Proposals, either by the Allowance of each, if the Order authorizes the Master to appoint two or more Receivers, or allowing the Proposal of that Party, who in his Judgment and Opinion ought to have the Appointment of the Receiver. Where the Appointment has been very adversely Contested, and Counsel have attended for each Party, neither of whom would give Way to the other, the Master has, by Consent,

(a) 2 Vol. 467.

(b) Gregg, Esq. v. Corfield,
 one, &c. Trm. 1826.

allowed the Proposal of each, and appointed two Receivers (*h*).

The Master having decided upon the Proposal, the Draft of a Recognizance, to be entered into by the Receiver and his Sureties, and of an Affidavit of the Sufficiency of the Sureties, will be prepared in the Master's Office; a Warrant must be taken out by the Solicitor *on preparing them*, and served on the adverse Clerks in Court, and Copies must be taken by the Receiver, and the Solicitors, for such Parties in the Cause as are interested in the Appointment; the Recognizance and Affidavit are then ingrossed upon proper Stamps, and the Master signs his Allowance in the Margins of each: and a Report of the Master's Approval of the Receiver, and of his having settled and allowed the Recognizance and Affidavit, is prepared, and Warrants, *on preparing, to settle, and to sign* the Report, are severally taken out and served. Copies of the Report must be taken by the Receiver and the Solicitors for the Parties interested; the Report is afterwards transcribed, signed by the Master, and usually remains in the Master's Office until the Report appointing the Receiver is signed: the next Proceeding is to take out a Warrant for the Receiver and his Sureties to enter into the Recognizance, and for the Sureties to swear the Affidavit of Sufficiency.

The Receiver and his Sureties must personally attend and enter into the Recognizance before the Master, and the Sureties must justify by Affidavit of their Sufficiency: in the Country the Recognizance, &c. may be taken before a Master Extraordinary; the Recognizance is then carried by the Master's Clerk to the Inrollment Office in Chancery, inrolled there, and a Receipt taken; the Affidavit remains in the Master's Office. A Report of the Appointment of the Receiver must be prepared, and Copies taken by the Receiver and all Parties interested; and Warrants *on preparing the Report, to settle and to sign*, taken out,

served, and attended. The Report is then transcribed, and signed by the Master, which, together with the Report of Approval, must be filed at the Report Office, and Office Copies taken by the Receiver and all Parties interested in the Appointment.

The Costs of the Appointment, and incidental Proceedings, in the first Instance, must be paid by the Receiver, who in passing his first Account will be allowed such Costs, and for which he must bring in a Bill to be taxed, and allowed to him in his Receivership Account.

There are Cases, where Persons *named by the Parties in the Cause* have been appointed Receivers on their own Recognizances only (a); where the Appointment of a Person to be Receiver, is made by the Testator, and confirmed by the Court, the Personal Recognizance of such Receiver is sufficient (b); the Assignment of a Mortgage belonging to a Receiver, instead of pursuing the usual Course of taking Securities in a Recognizance, has been deemed improper (c). The Manager of an Estate in the *West Indies* gives a Security to account for the Produce, and to consign, so far as the Management requires it (d). If the Time for inrolling the Recognizance has elapsed, an Order may be obtained to inroll it *nunc pro tunc* (e).

Where the Estates lie at a great Distance from each other, or the annual Rents are very considerable, it may be necessary to appoint more than one Person Receiver, (in the latter Case additional Sureties might be taken) the above Form of Proposal would be proper: but if one Receiver only is appointed for all the Estates, then the Place where the Estates are situate is not usually inserted in the Proposal. The Appointment, if contested, may make it advisable to prepare a State of Facts introductory to the Proposal, shewing the Situation of the Property, the annual Value, and any other material and auxiliary

(a) Dick. 68.

(b) 3 Meri. 681.

(c) 3 Atk. 287.

(d) Dick. 90.

(e) 1 Ves. j. 139.

Circumstance necessary for the Master's Information : **and** as the Approbation of a Majority of the Parties interested in the Appointment might have great Weight with the Master in deciding upon the Person proper to be appointed, the Solicitor would act prudently in being prepared with the Consent in Writing, and Recommendation of such of the Parties in the Cause as are most materially interested in the Estates, and are of Age, for the Appointment of the Person whom he proposes to be Receiver. A Stranger cannot propose a Receiver (*a*). Where the Application for a Receiver is at the Instance of a Mortgagee, the Master usually appoints such Person as the Mortgagee proposes, unless there is some personal Objection to the Man (*b*), and if the Person so appointed embezzles the Rents, the Loss falls on the Mortgagor (*c*).

The Master's Judgment in appointing a Receiver, it should seem, is discretionary and conclusive, unless some *substantial* Objection is shewn ; he need not state his Reason, and Exceptions to such Reports are not favoured (*d*) ; the Master's Report of his Approbation must stand till the Person is impeached as improper. (*e*) To support an Exception, a strong Case of Disqualification is necessary ; the Receiver must be *shewn* to be an unfit and improper Person : without a Special Case the Court will not controul the Appointment of the Master (*f*), and although the Master's Judgment is not *absolutely conclusive*, the Court interferes with Reluctance : the Recommendation of the Testator, and the Respect due to a considerable Family, are to be attended to in the Appointment (*g*) : and where the Court expresses a Reluctance to interfere, the Master is sometimes directed to review or re-consider the Appoint-

(*a*) 2 Madd. Rep. 246.

(*b*) 3 Ves. 365.

(*c*) 3 Bro. C. C. 365.

(*d*) 1 Ves. j. 452. 3 Ves. 137, 515, 588.

(*e*) Dick. 687.

(*f*) 2 Ves. j. 137. 3 Ves. 164, 315. 12 Ves. 317. 3 Br. C. C. 508. 2 Br. C. C. 253.

(*g*) 15 Ves. 283.

ment. Where the Neglect of the Parties to propose has been accounted for, the Master has been directed to review his Report, and to receive the Proposal (*a*); where an Executor, being out of the Jurisdiction, a Receiver had been appointed under the Stat. 36 Geo. 3, c. 90, which is defective in not providing for the accounting by such Receiver; on Administration taken afterwards, the Court directed the Master to re-consider the Appointment, with reference to the Administration (*b*).

In *Crews v. Bishop of London*, the Choice of the Master being objected to, upon a Reference back by Lord Kenyon to Mr. Greaves to review his Report, and to state his Reason for preferring one of two Persons proposed, the Master certified specially, that in twenty-five Years' Experience he remembered only two Instances of a Contest for the Office of Receiver, for that it was a prevailing Opinion in the Masters' Offices, that the Master's Judgment in the Appointment of a Receiver was conclusive, but not in the least insisting upon or intimating any Right in the Master to originate the Proposal of a Receiver (*c*).

The regular Course to bring a Report appointing a Receiver, before the Court, is by filing Exceptions in the first Instance (*d*), for which see Title "Exceptions," or an Objection may be brought on by a Petition (*e*).

Persons absolutely disqualified from being appointed Receiver are *Trustees* whether sole or jointly with others (*f*); the general Rule is, that a Trustee shall not be Receiver of the Trust Estate with Emolument: a Trustee can be appointed Receiver only, where no other Person can be found to act (*g*); the Appointment of a Trustee is very

(*a*) 2 Madd. Rep. 246.

(*b*) 1 Coop. 200.

(*c*) *Ex parte Fust*, Hil. 1804.
Dick. 687. 2 Madd. Rep. 254.

(*d*) Dick. 687.

(*e*) 6 Ves. 459.

(*f*) 8 Ves. 72. 3 Ves. 515.
11 Ves. 363.

(*g*) 15 Ves. 586.

rare: a Trustee to preserve contingent Remainders, with Powers of Leasing, and to sell and exchange, but the latter Power not to be exercised during the Minority, has been held within the Rule (a). A *Master in Chancery*, (b) an *Attorney or Solicitor*, directly or indirectly retained, or however remotely interested in the Cause, is absolutely disqualified from being Receiver (c); the Solicitor under a Commission of Lunacy cannot be appointed Receiver of the Lunatic's Estate (d); *Attornies and Solicitors* are not as such absolutely disqualified; the Court however appoints them with Reluctance to be Receivers; and if appointed, upon very slight Objection, as in the Instance of an indirect controuling Power over the ostensible Solicitor, will displace them. Lord Thurlow expressed an Opinion that all Professional Persons were improper, and that it would be better to make a Standing Order to that Effect than to take Exceptions: the *next Friend* of an Infant Plaintiff cannot be appointed Receiver (e), a *practising Barrister*, or a *Member of the House of Commons*, are not absolutely ineligible, but are Circumstances to be seriously regarded (f). A *Peer of the Realm* cannot be appointed Receiver; the same Remedies cannot be had against a Peer as against a Commoner; in many Instances a Receiver may be committed; the same Objections seem to apply to the Appointment of a Member of the House of Commons (g); a *Receiver General* of a County cannot be appointed, the Priority of Prerogative Process might sweep away all his Property (h); in one Instance *the Mother of an Infant* was appointed Receiver of the Infant's Estate, where the Surplus of the Rents beyond the Maintenance was trifling, and no Salary allowed.

(a) 1 Ves. 584.

(b) 6 Ves. 427.

(c) 2 Ves. j. 137. 15 Ves. 283.
585.

(d) 2 Meri. 452.

(e) 2 Madd. Rep. 64.

(f) 2 Ves. 137. 15 Ves.

(g) 2 Ves. and Bea. 208.

(h) 2 Madd. Rep. 246.

The *Duty of a Receiver* is to collect the Rents of the Estate, and for this Purpose, he should in the first Place call upon the Tenants to attorn, producing the Order and Report appointing him Receiver: if he meets with a Refusal, he must apply by Motion to the Court for an Order upon the several Tenants, naming them, to attorn and pay their Rents to him as Receiver in the Cause, (see Title "Notice.") To ground such an Application, it will be sufficient to state the Order of Reference, and the Report, and an Affidavit of the Refusal of the Tenants, and such special Facts as may be necessary; and the Court will make the Order as of course, which must be drawn up, passed, entered, and a Copy of the Order served *personally* upon each refractory Tenant; and Obedience, if necessary, must be enforced by Order, obtained upon Affidavit of Service of the Order to attorn, and the Refusal, for a Commitment for Disobedience of the Order to attorn; and the ordinary Course of Proceeding, to make the Order effective, must be pursued, and which will be found in a former Part of this Work; the Tenants *not being Parties to the Suit*, a Writ of Execution of the Order would be *irregular*, and if issued, probably the Court would visit the Solicitor with the Costs of the Writ and Proceedings. Where the Owner of the Estate is in Possession, Application should be made for an Order to deliver up Possession to the Receiver (a). The Receiver is to set and let the Estate to the best Advantage, and for the best and most approved Rent; but it should be observed that he cannot raise the Rent upon slight Ground, nor turn out the Tenants, nor even let for a Year, without a Reference to the Master (b). But where a Tenant has held over after Notice, a Receiver in Chancery giving Notice to quit or pay double Rent, has been held at Law *an Agent lawfully*

(a) 2 Ves. 401. 3 Bro. C. C. 87. 1 Ves. j. 161. (b) 1 Ves. j. 139. 165, 2 Bro. C. C. 88.

authorized to entitle the Landlord to double Value of the Premises under the Statute 4 Geo. 2. c. 28 (a); and a Receiver under a general Authority, to let Lands from Year to Year, has been considered at Law as having an Authority to determine such Tenancies by a Notice to quit (b); where there is no Power of Leasing, the Court cannot let beyond the Minority of the Infant (c).— When a Lease is to be granted of any part of the Estate, an Application must be made by the Receiver to the Court by Motion on Notice, (see Title “ Notices,”) for an Order of Reference to the Master to inquire and state “ whether it would be proper “ to let any and what Part of the Estate in question on “ Lease, and upon what Terms and Conditions.” The Order must be drawn up, passed, entered, and served upon the respective Clerks in Court, and left at the Master’s Office, and a Proposal in Writing, (see Title “ Proposals,”) for taking a Lease, must be brought in by the Receiver, and a Warrant on leaving the Proposal, and successive Warrants to proceed on the Proposal must be taken out, served, and attended. When the Proposal is allowed by the Master, he will make his Report, which must be filed, and an Office Copy taken from the Report Office; a Petition must be prepared, see Title “ Petitions,” for an Order to confirm the Master’s Report, and a Reference back to the Master to settle and approve of a Lease to a Tenant upon the Terms and Conditions in his Report, and to tax the Costs of the former, and of that Application, and of the Costs consequential thereon. This Petition must be set down for hearing; and upon reading the Order of Reference and Report, the Court will make an Order as prayed; the Counsel’s Brief must be left at the Register Office with the original Petition, and the Order drawn up,

(a) 5 Burr. 2694.

(c) 15 Ves. 538.

(b) 12 East. 57.

passed, and entered; a Draft of a Lease must be prepared by the Receiver or his Solicitor, upon the Terms and Conditions in the Proposal, and with the Order left at the Master's Office, a Warrant on leaving, and Warrants to proceed and settle the Draft of Lease must be taken out, served, and attended; when the Master has settled the Draft, an Ingrossment is made in the Master's Office; and the Master marks his Allowance thereof on each Skin, and makes a Certificate of his settling and allowing the Lease, which must be filed at the Report Office, and requires no Confirmation by the Court.

The Lease must be taken from the Master's Office, and executed by the Receiver, and a Counterpart should be prepared and executed by the Tenant, who may then be let into Possession of the Lands demised. The Costs of this Proceeding must be paid by the Receiver, and charged by him in his receivership Accounts.

The *Receiver's Salary*, though directed by the Order, is not submitted to the Master's Consideration until the Receiver brings his first Account into the Master's Office, to be passed, in which he charges for receiving, &c. a Sum *in solido* at the rate of *5l. per Cent.* upon the gross Rental of the Estates: the Allowance of which in the Receivership Account by the Master, is the *Salary allowed to the Receiver for his Care and Pains*: if any Objection is to be made to the Salary claimed, it should be taken upon the passing the Receiver's *first Account*; but although by the Course of Practice, *5l. per Cent.* is usually allowed, it is the *Maximum*; and where the Rental is very considerable, a per Centage at a much lower Rate would be allowed, or a stated Salary sufficient to compensate the Receiver's Services. Where the annual Rents have been 10,000*l.* the Receiver has been allowed an annual Salary of 300*l.* and so in Proportion; the Master's Judgment upon the Quantum of the Salary is usually decisive. The Manager of an Estate in the West Indies,

to entitle himself to a Commission, *must be resident* in the Island where the Estate is situated, and *personally acting* in the Absence of the Owner ; but although he may not be entitled to charge Commission, he will be entitled to a reasonable Allowance for what he has paid to others for the Management, which, if disputed, must be decided by a Reference to a Master (*a*). By Way of Instruction to the Receiver, the Solicitor should apprise him, that he will not be entitled to any Compensation for his Trouble, unless what he does is in Pursuance of an Order of the Court, as in the Instance of the Disallowance of a Receiver's Attendance upon the Survey of an Infant's Estate, without an Order for that Purpose (*b*).

A Receiver cannot lay out Money in Repairs at his Discretion : he may lay out a small Sum in Repairs (*c*), but the Master will not allow the Receiver in his Account Repairs done to any considerable Extent, without the Authority of the Court ; where a Receiver has laid out Money in Repairs, without any previous Order, the Court is in the Habit of directing a Reference to the Master, to inquire into the Circumstances under which the Expenditure has been made, and if the Repairs are shewn, and the Master certifies that they were for *the lasting and substantial* Benefit of the Estate, and of the Parties interested in the Transaction, and as an auxiliary Circumstance with the Concurrence and Direction of Trustees, an Order for the Allowance has been made (*d*) ; if the Estate of which the Receiver is appointed, be a Tenancy for Life, and there is a Power to cut Timber for Repairs, it has been held that the Timber cut cannot be sold to reimburse the Expenditure in Repairs, the Timber itself

(*a*) 2 Meri. 68.

(*d*) 3 Atk. 274. 6 Ves. 799,

(*b*) 1 Ball. and Bea. 189. 802. 11 Ves. 563. 2 Meri. 15 Ves. 26.

56.

(*c*) 15 Ves. 26.

must be used in the Repairs (*a*); but by a late Decision, the Right to cut Timber for Repairs extends to selling Timber, and applying the Produce (*b*). Managers in the *West Indies* seem to have a Discretion allowed them in regard to their Expenditures. A Receiver cannot be *obliged* to pay any Thing without an Order of the Court (*c*).

A Receiver cannot proceed by Ejectment (*d*), nor can an Ejectment be brought against a Receiver in Possession without Leave of the Court (*e*); upon an Application by a Receiver for Leave to defend an Ejectment, and to be allowed the Costs, though the Parties were Adult and consenting, a Reference was made to a Master, to inquire whether it would be for their Benefit (*f*): a Receiver cannot distrain upon the Owner while he remains in Possession of all or any Part of the Estates; not being Tenant to the Receiver, an Application must be previously made, for an Order to deliver Possession to the Receiver (*g*); for Rent in arrear *within the Year*, a Receiver may distrain at his own Discretion; but if in Arrear for more than a Year, or if it be doubtful who has the legal Right to the Rent, an Order for that Purpose is necessary (*h*); Tenants not Parties cannot apply to pay their Rents into Court, but to prevent a Bill of Interpleader, upon the Application of the Plaintiff consented to by the Defendant, an Order for Payment may be obtained (*i*). And as the legal Remedy by Distress cannot be enforced against a Receiver or Sequestrator where a Person, a Mortgagee for

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|-----------------------------------|----------------------------------|
| (<i>a</i>) Coop. 136. 3 Bro. C. | (<i>f</i>) 6 Ves. 287. |
| C. 37. 1 Ves. j. 78. | (<i>g</i>) 2 Ves. 401. |
| (<i>b</i>) 3 Meri. 421. | (<i>h</i>) 5 Madd. 473. 3 Atk. |
| (<i>c</i>) 1 Ves. j. 85. | 750. 1 Ves. j. 161. Dick. |
| (<i>d</i>) 3 Bro. C. C. 88. 1 | 120, 787. |
| Ves. 164. | (<i>i</i>) 6 Madd. 28. |
| (<i>e</i>) 9 Ves. 335. | |
| VOL. I. | ■ ■ |

instance, claims a prior Interest in Estates in their Hands, (which he is allowed to prosecute *forma pauperis*) (*a*), by a summary Application on Motion with Notice, he may obtain a Reference to a Master to enquire if any, and what Part, of those Estates are comprised in his Mortgage, and what is due for Principal and Interest thereon, and the Priorities of other Claimants, with Liberty to come in and be examined *pro interesse suo*, and if his Claim should be established, by Petition confirm the Report absolutely, and obtain an Order for payment of the Rents of the Mortgaged Estate, towards the Principal and Interest due, and for delivery of that Estate to the Mortgagee: as Exceptions do not lie, Objections to the Report must be brought on by a Counter-petition against the Confirmation (*b*); but in Sequestrations, where the Facts are not disputed, or made a Question of Law, the Court will not send the Parties into the Master's Office, but *brevi manu* decide, and direct Rent to be paid out of Property sequestered, not considering the Sequestration as an Execution within the Statute of 8 Ann. c. 14. restricting the Landlord's claim to One Year's Rent, but the whole Rent due: Lord Eldon in a recent Instance, directed 'Two Years' Rent to be paid out of Property taken under a Sequestration (*c*). The Appointment of a Receiver discharges a Sequestration (*d*). As connected with the Duty of a Receiver, it may be useful to remark, that Goods levied in Execution by the Sheriff, though remaining upon the Premises, being in *custodio legis*, cannot at common Law be distrained (*e*); but a remedial Law (*f*) has made it imperative upon the Sheriff after Notice of the Landlord's claim for Rent (*g*), before he removes the Goods, to pay One Year's Rent to the Landlord, due at the *Time of*

(*a*) 6 Dick. 788.

(*d*) 3 Ves. 22.

(*b*) 1 P. Wms. 306. 1 Ves.
180. 2 Madd. Rep. 21. Dick.
94, 640, 622.

(*e*) Wills. 136. 141.

(*f*) Stat. 8 Ann. c. 14.

(*c*) 1 Swanst. 459.

(*g*) 3 Bos. and Pul. 440. 3
Swanst. 400.

the Seizure, and not accruing afterwards, or during the Continuance of the Sheriff in Possession, without Deduction for Poundage (*a*); but the Landlord's Right under the Statute accrues only to the *immediate* Landlord of the Tenants, and not to a ground Landlord (*b*); if Goods are seized under an *Extent in Chief, or in Aid*, the Landlord has no Means of recovering his Rent, unless there be a Surplus (*c*): where the Tenant becomes *Bankrupt*, the Landlord retains his Right to Distrain for *the whole Arrears of Rent* so long as *the Goods remain upon* the Premises, although the Messenger be in Possession (*d*), or though the Assignment has been executed, and the Assignees are in Possession (*e*), or have been sold to a Stranger (*f*); a Commission of Bankrupt not being an Execution within the Statute 8th Ann, the Landlord cannot avail himself of the Equity of that Statute, and claim a Year's Rent in preference to other Creditors (*g*); if he suffer the Goods to be removed from the Premises without distraining them, he loses his Remedy by Distress, and can only come in and prove his Debt under the Commission (*h*).

By the Standing Orders of the Court (*i*), the Masters are to fix the Days for the Receivers *annually* to deliver their Accounts to the Masters, and the Days upon which the Balances appearing due are to be paid in. And Receivers neglecting to deliver in such Accounts or to pay the Balances at the Time so fixed, the Masters are ordered to disallow their Salaries, and charge Interest at 5% per Cent. upon the Balances in the Hands of the Receiver when the subsequent Accounts are produced. And every Receiver appointed by the Court is ordered to *procure*

(*a*) Stra. 643.

(*b*) Stra. 787.

(*c*) Bunb. 5, 269. 6 Price, 230.
19. 2 Ves. 288.

(*d*) 1 Atk. 104.

(*e*) 1 Atk. 105.

(*f*) 1 Atk. 105.

(*g*) Cox. 177. 15 East.

(*h*) 1 Atk. 103.

(*i*) Ord. Canc. Bea. Ed.
454, 461.

his annual Account of Receipts and Payments, to be examined and settled by the Master within Six Months next ensuing the Time appointed by the Master for delivering such Accounts. And in Cases of Neglect, the Master is annually to make a Certificate of the Default, and of the State of the Account ; but this Order has not produced the Effect it was intended, and is rarely if ever put in force.

Lord Eldon was not merely of Opinion that a Receiver who does not pass his Accounts would be liable to pay Interest, but that it would be a Question how far the *Solicitor for the Estate was liable*, whose bounden Duty it is to *oblige* the Receiver to pass his Account and pay the Balance, and by whose *Negligence* it must be occasioned (a); that as against the Solicitor, the Application might be by Motion upon Notice or, Petition, supported by Affidavit.

The Form of the Receiver's Account may be obtained from the Master's Office ; it comprises the Situation of the Estate, the Names of the Tenants, Arrears of Rent of the preceding Year, Rents due, Rents received, Arrears due ; and lastly, Observations, &c: The Money paid, and Allowances made to Tenants, and the Receiver's Salary, are then stated, and regularly disposed in Columns ; (for the Form of which see Title "Receiver's Accounts)" and the Balance in the Receiver's Hands must be paid into Court. This Account is passed by the Receiver leaving a Copy at the Master's Office, and taking out a Warrant upon leaving, and Warrants to proceed, serving them upon the Clerks in Court for the Parties interested, and attending and producing proper Vouchers and Receipts for the Monies paid, and which the Master should mark as produced : the Receiver's Bill of Costs, for passing his Accounts, should also be brought in, and the usual Warrants on leaving and to settle should be taken out, served, and attended. The Account is entered in a Book kept at

(a) 8 Ves. 72.

the Master's Office, a Duplicate of which, containing a Copy of the Account, is entered in another Book, which the Master's Clerk delivers out to the Receiver after the Master has made his Report. The Account must be verified by the Affidavit of the Receiver, which is annexed to each yearly Account in the Master's Book; (for the Form of which, see Title "Affidavit.") The Master will make his Report of passing the Account, Copies of which must be taken by the Receiver and the Solicitors for the Parties interested, and the usual Warrants on *preparing, to settle, and to sign*, must be taken out by the Receiver, served and attended. The Report, which requires no Confirmation by the Court, must be filed at the Report Office, and an Office Copy taken. The Balance in the Receiver's Hands must be paid into Court *immediately* after the Receiver's Account is reported by the Master, and for this Purpose *no new Order is required*: the Receiver should apply to the Accountant-General for the usual Direction to pay the Balance into the Bank, and which will be given to him upon his producing the Order and the Report appointing him Receiver; the Order always provides for Payment of the Receiver's clear Balance into the Bank. This Order, with the Master's Report upon passing the Receiver's Accounts, will be sufficient for the Accountant-General, and he will give the requisite Directions to the Bank. Instructions for Payment of Money into the Bank will be found in another Part of this Work.

The Receiver should be informed, that the Order of Reference for appointing a Receiver *always* provides for the Payment of his Balance into the Bank; but where the *Order* is defective in that Respect, he will not be allowed to avail himself of it, and to keep a Balance in his Hands without Interest, under a Pretence of waiting for some Party in the Cause to obtain an Order upon him for Payment; he ought upon his own Application to obtain an Order, the Costs of which will be allowed him by the

Master in his Account, and unless he does so the Court will Charge him with Interest (a).

The Receiver should pay strict Attention to the passing his Accounts annually, and paying in the Balance. *Lord Eldon* has expressed himself in very strong Terms upon the Misconduct of Receivers: it has been determined that a Receiver not passing his Accounts regularly shall always pay Interest upon the Balances in his Hands, and not be entitled to any Salary (b); and it should seem that if the Receiver of *personal Estate* does not pass his Accounts and pay in his Balance, he will not only lose his Salary, but be charged with Interest, not upon each Sum from the Time it was received, according to the strict Rule applicable to a Receiver of Rents and Profits, but as an Executor would be charged in respect of his Receipts (c). The Course of Proceeding to enforce Payment of the Balance, is either by obtaining an Order upon the Receiver for Payment of the Balance reported due: for which Purpose, an Application by Motion upon Notice, (see Title "Notices,") supported by the Master's Report for an Order, must be made, and the Order be drawn up, passed, entered, and served *personally* upon the Receiver, and if he absconds, an Order must be obtained, that Service, by leaving the Order for Payment at his Dwelling with one of the Family may be substituted, and the usual Course of enforcing Obedience by Commitment, for which Instructions have been before given; or the Recognizance may be put in Suit against the Sureties (d). And if the Receiver while in Custody upon a Warrant of Commitment, to procure his Discharge gives a promissory Note for the Debt and the Costs of Contempt, in which another

(a) 15 Ves. 274.

(c) 15 Ves. 273

(b) 8 Ves. 72. 371. 3 Atk. 274. 3 Bro. C. C. 41. 1 Ves. 158. j. 85.

(d) 14 Ves. 143. Infr. pa-

Person joins as Surety, the Discharge has been held a legal Consideration for the Note, although the Sum given to cover the Costs exceeded the Costs taxed (*a*).

A Receiver making Remittances to a Banker, to his own Credit, and not to a separate Account for the Trust, will be charged with a Loss occasioned by the Failure of the Banker (*b*) ; so if Fraud or Collusion appear, or a Loss by wilful Default ; but not if deposited with the Testator's Banker, who fails (*c*).

Sureties for a Receiver will not be discharged at their own Request until their Office is at an End and their Accounts finally settled, nor will the Court regard the Application, unless for the Benefit of the Parties in the Cause (*d*). A Surety for a Receiver is entitled to stand in the Place of the Receiver, and to be indemnified out of a Balance due to the Receiver in respect of Disbursements made by the Surety for the Receiver (*e*).

When the Office of Receiver is at an end, or the Object of the Appointment has ceased, which in the Case of an Infant, Lord Eldon has decided to be one Year after the Infant has arrived at the Age of twenty-one Years, the Receiver should apply to the Court to be discharged from his Receivership, and that the Recognizance entered into by himself and his Sureties should be vacated : at any distant Period if a material Error should be discovered in his Account, the Money may be recovered if the Recognizance be suffered to remain in force ; for this Purpose, the Receiver must pass his final Account, and obtain the Master's Report and the Accountant-General's Certificate of the Payment of the Balance reported due into the Bank, or the Order for Payment to the Person entitled to receive it. The Court

(*a*) 16 East. 293. 2 Bos. and Pul. 151.

(*b*) 11 Ves. 377. 3 Atk. 480.

(*c*) 13 Ves. 566. 3 Atk. 480. Ambl. 219.

(*d*) 2 Ves. 400.

(*e*) 1 Coop. 61. 3 Ves. & Bea. 134. 1 Madd. R. 528.

Fund and Money (for the Transfer and Payment, whereof the Application is made) as stated in the Petition, or as represented by the Counsel on the Motion.

Instructions having been given of the Manner in which a Transfer and Payment by the Accountant-General are to be obtained, it is therefore unnecessary to say any Thing further on that Head, except that on a Transfer the Accountant-General will require the same Description of the Person to whom the Transfer is to be made (in order that the Fund may be properly transferred into his Name in the Books of the Bank) as the Petitioner, if having made a Purchase of Stock on his own Account, would furnish his Broker with, to be inserted in the Books at the Bank. If the Person to whom the Stock is to be transferred has already an Account at the Bank in the Books of the Fund to be transferred to him, it will be transferred to that Account, if proper Directions are left at the Accountant-General's Office for that Purpose.

BILL OF COSTS
FOR
DEFENDANTS IN THE FOREGOING CAUSE.

IN CHANCERY.

BETWEEN *John Lawrence, and others*, PLAINTIFFS.

AND,

George Wilson, and others, DEFENDANTS.

Bill of Costs of Defendants George Wilson, and others.

HILARY TERM, 1820.

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
ATTENDING the Defendants, Wilson and Johnson, on their being served with Subpœnas in this Cause, and conferring and advising thereon	-	0	6	8		
Attending Mr. Stephen Lawrence and several other of the Defendants, on their having been served with Subpœnas, and taking Instructions to appear	-	0	6	8		

FOR DEFENDANTS.

475

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Drawing Warrant to defend, and filling up same on a 5s. Stamp and Duty - -	0	7	6			
Paid entering Appearance for eight Defendants - -	1	0	0			
Paid for Office Copy Bill, fo. 96	5	12	0			
Making a close Copy thereof (a)	1	12	0	1	12	0
Perusing and considering the same	0	6	8	0	6	8
February 6. Attending Mr. Wilson and Mr. Johnson, conferring and advising on the Bill filed, the Answer required, and instructing them in what Manner to make out the Accounts required by the Bill	0	13	4	0	13	4
Making Copy of the Will of their Testator for Use in the Cause, four Brief Sheets -	0	13	4	0	13	4
The like of his Marriage Settlement, Six Brief Sheets -	1	0	0	1	0	0
Perusing and considering the same	0	6	8	0	6	8
Instructions for Counsel to move for a Month's Time to answer	0	2	6			
To Mr. Maddock, to move	0	10	6			
Attending him therewith, and Court	0	6	8			
Paid for Order, Entry, Copy, and Service - -	0	9	0	0	1	6
(b) Term Fee, Clerk and Solicitor	0	16	8			
Letters and Messengers -	0	5	0			

(a) A close Copy is not allowed as a Fee; it is allowed if made in a Country Cause, but never in a Town Cause.

(b) The Term Fee is by the late Orders allowed for the Clerk in Court of the Term an Appearance is entered; his Fee is not included in the Fee paid him for entering the Appearance as formerly.

HILARY VACATION.

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Drawing (a) Petition for three Weeks further Time to answer, engrossing, and Duty -	0	4	7	0	4	7
Paid answering same (at the Rolls)	0	5	6	0	5	6
Attending thereon, and to draw up Order - -	0	6	8	0	6	8
Paid for Order, Entry, Copy and Service - -	0	9	0	0	9	0
Letters and Messengers -	0	1	0	0	1	0

EASTER TERM, 1820.

Instructions for Counsel to move for a Fortnight's further Time to answer - -	0	2	6	0	2	6
To Mr. Maddocks therewith	0	10	6	0	10	6
Attending him therewith, and Court	0	6	8	0	6	8
(b) Paid entering Appearance with Register - -	0	6	8	0	6	8
Paid Clerk in Court for his Attend- ance - - -	0	6	8	0	6	8
Attending thereon -	0	6	8	0	6	8
Paid for Order, Entry, Copy, and Service - -	0	9	0	0	9	0
March 18. Attending Mr. Wilson and Mr. Johnson, taking Instruc-						

(a) But one Order for Time is allowed in Costs between Party and Party.

(b) The Fee paid on entering Appearance for the Parties with the Register is 6s. 8d: according to the late Order of Court.—
Lord Erskine's Orders for regulating the Fees.

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
tions for their Answer, the whole of this Morning - -	0	13	4			
March 19. Attending them again the whole of this Morning, on the same Subject - -	0	13	4	0	6	8
— 20. Attending them again this Morning, conferring on their Accounts, perusing them, and the Books and Accounts of their Testator - -	0	13	4	0	6	8
Drawing the Answer, and Schedules, fo. 210 - -	10	10	0			
Making fair Copy thereof for the Defendant's Perusal (a) -	3	10	0	3	10	0
March 30th. Attending them reading over and settling the Draft, and making several Alterations therein - -	0	13	4	0	6	8
Fee to Mr. Maddocks, to settle and sign the same, and Clerk -	3	5	6			
Attending him -	0	6	8			
Term Fee, Clerk, and Solicitor	0	16	8			
Letters and Messengers -	0	5	0			

TRINITY TERM, 1820.

Engrossing Answer, fo. 210.	5	5	0
Paid for Parchment and Duty, five Skins - -	2	15	0
Attending the Defendants, reading over the Engrossment, before sworn, fo. 210 -	1	13	4
Paid Oaths - - - -	0	2	0

(a) The fair Copy is included in the Charge of 1s. per Folio for Drawing.

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Attending with Defendant to get						
Answer sworn - -	0	6	8			
Paid filing Answer -	0	3	4			
Taking Instructions for the Answer						
of the Defendant, Stephen Lawrence, the Heir at Law -	0	13	4			
Drawing same, fol. 24. -	1	4	0			
Fair Copy thereof (a) -	0	8	0	0	8	0
Attending him, reading over, and settling the same -	0	6	8			
Fee to Mr. Maddock, to settle and sign same, and Clerk -	1	3	6	0	2	6
Attending him -	0	6	8			
Engrossing the Answer -	0	12	0			
Paid for Parchment and Duty	0	10	0			
Attending the Defendant, reading over the Engrossment before sworn - - -	0	6	8			
Paid Oath - -	0	1	0			
Attending Defendant to get Answer sworn - -	0	6	8			
Paid filing Answer - -	0	3	4			
Attending taking Instructions for the Answer of John Stephens the Elder, John Williams, Joseph Williams, and Mrs. Holroyd	0	18	4			
Drawing same, fol. 15. -	0	15	0			
Fair Copy thereof for Counsel to settle and sign (b) -	0	5	0	0	5	0

(a) Fair Copy is now included in the 1s. per Folio drawing, but never allowed where Counsel draws the Pleading, and in Strictness in no other Case, unless in Country Causes.

(b) Fair Copies are included in the 1s. per Folio drawing.

FOR DEFENDANTS.

479

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
To Mr. Maddock therewith, and						
Clerk - - -	1	3	6			
Attending him -	0	6	8			
Attending Mr. Wilson, advising on the Situation of the Defendant Mrs. Holroyd, who was in a State of Insanity, and abandoned by her Husband - -	0	6	8	0	6	8
Attending Dr. Simmonds, under whose Care she was, taking In- structions to draw his Affidavit of her Situation - -	0	6	8			
Drawing Brief for Counsel to move for a Commission to assign a Guardian to Mrs. Holroyd, a Person of unsound Mind, by whom she might answer and de- fend the Suit and Copy -	0	6	8			
Drawing Affidavit in Support there- of, Duty and Oath -	0	10	1			
Paid filing same, and for Office Copy thereof	0	9	0			
To Mr. Maddock to move	0	10	6			
Attending him with Instructions	0	6	8			
Attending Court on Motion	0	13	4			
Paid for Order, Entry, Copy, and Service -	0	10	6			
Paid for the Commission	1	13	7			
Attending on the Execution there- of - -	0	13	4			
Drawing Return to the Commission, Engrossing and Duty	0	13	4			
Paid the Commissioners for their Trouble - -	1	6	8			
Instructions for Counsel to move						

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
that the said Defendant might answer separate from her Husband - -	0	2	6			
To Mr. Maddock to move	0	10	6			
Attending him therewith, and attending Register to Draw up and enter Order - -	0	6	8			
Paid for Order, Entry, Copy, and Service - -	0	10	6			
Engrossing the Answer -	0	7	6			
Paid for Parchment and Duty	0	8	0			
Paid filing Answer -	0	3	4			
Attending the several Defendants, whose Answer was to be taken without Oath, reading over the Answer -	0	13	4			
Fair Copy thereof for them to sign (a) - -	0	5	0			
The Plaintiffs having obtained an Order for the Defendants, the Executors, to transfer the Money standing in the Testator's Name, and likewise in their own Names in the Books in the Bank, to the Accountant-General, attending the Plaintiff's Solicitor for the Order for that Purpose -	0	6	8			
Attending the said Defendants thereon, and explaining to them the Necessity of making the Transfers	0	6	8	0	6	8
Attending at the Accountant-Gen-						

(a) The Defendant, whose Answer is to be taken without Oath, must sign the Ingrossment of the Answer; and the Signature must be attested by the Solicitor for the Defendant, or some other Person or Persons of respectability.

	CHARGE.			TAX-OFF.		
	£	s.	d.	£	s.	d.
ral's Office with the Order, bespeaking the proper Tickets to enable the Transfer to be made, and afterwards for the same -	0	6	8			
The Defendant Johnson, one of the Executors, being confined to his House by Sickness, attending at the Bank to bespeak a Power of Attorney from him to the other Defendant to enable him to make the Transfer, and attending afterwards for the same -	0	13	4			
Paid for a Power of Attorney to transfer the 3 per Cent. Consolidated Annuities in the Testator's Name - - -	1	6	8			
The like in the Executor's Name,	1	6	8			
The like in the Testator's Name, in the Reduced Annuities	1	6	8			
Attending the Defendant Johnson, reading over and attesting the Execution of the above three Letters of Attorney -	0	13	4	0	13	4
July 26th. Attending the Defendant Wilson at the Bank, the whole of this Morning, on making the several Transfers to the Accountant-General -	0	13	4			
Paid Brokerage, &c. -	2	12	6			
Paid filing the Accountant-General's Certificates of the several Transfers - -	0	11	6			
The Plaintiffs having amended their Bill, by adding Parties and other Matters, perusing and considering						
Vol. I.	1	1				

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
the Amendments, to see if it was necessary to answer them	0	6	8	0	6	8
Attending Mr. Venables, the Mortgagee of Part of the Testator's Estates, and who was a Defendant added to the Bill by the late Amendments, taking Instructions to enter an Appearance for him	0	6	8			
Entering Appearance -	0	6	8			
Taking Instructions for his Answer	0	13	4			
Drawing same, fol. 30 -	1	10	0			
Fair Copy thereof for Counsel (a)	0	10	0	0	10	0
Fee to Mr. Maddock to settle and sign the same, and Clerk	1	3	6	0	2	6
Attending him -	0	6	8			
Attending the Defendant, reading over and settling the same, previous to its being engrossed	0	13	4			
Engrossing the same -	0	15	0			
Paid for Parchment and Duty	0	10	0			
Attending the Defendant, reading over the Answer as engrossed before sworn -	0	13	4			
Paid Oath - -	0	1	0			
Attending Defendant with the Engrossment to get Answer sworn	0	6	8			
Term Fee, Clerk, and Solicitor	0	16	8			
Letters and Messengers -	0	6	0	0	1	0

MICHAELMAS TERM, 1820.

A Bill of Revivor being filed on the Death of one of the Plaintiffs, attending the Defendant John Stephens, the Deceased's Father and

(a) Fair Copies are included in the 1s. per Folio drawing, but were never allowed where Counsel drew the Pleading, nor in Strictness in any other Case.

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
next of Kin, conferring and advising thereon, and on the Necessity of his taking out Letters of Administration -	0	6	8			
Entering Appearance to the Bill of Revivor - -	0	6	8			
Paid for Office Copy thereof, fol. 14	0	16	4			
Close Copy thereof (a) -	0	4	8	0	4	8
Perusing and considering the same, to see if it was necessary to put in an Answer thereto - -	0	6	8	0	6	8
Paid for Office Copy Replication	0	3	6			
Abbreviating the amended Bill, and Answers, fol. 96, 210, 24, 15, 30=						
375 (at 4d. per fol.) -	6	5	0			
Making two fair Copies thereof for Counsel for the Defendants, the Executors, 17 Brief Sheets each (b)	5	13	4			
Making Copy Brief for Counsel for the Defendant, the Heir at Law, 17 Brief Sheets -	2	16	8			

(a) Close Copies are included in the 1s. per Folio drawing, and allowed in Country Causes, not in Town Causes.

(b) A Work of great Practical Information, has laid it down as a Rule, that a Brief Sheet should consist of forty-two Lines, which if fairly written will comprise ten Common Law, or (after abbreviations,) Chancery Folios, after which rate Brief Sheets are computed. And such parts of Briefs as consist of Copies of Deeds, Wills, and other Documents, ought not to be allowed for in the Draft, and Matters not relevant to the Controversy, the Interrogating part of Bills in Chancery, and such Schedules to Answers, as from their nature are not necessary for the Information of Counsel, are not allowed for in the Copies; but that these Rules, though strictly regular, are sometimes not attended to.—*Mr. Lowe's Observations*, 27.

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
The like for Defendant, the Mortgagee, 15 Brief Sheets -	2	10	0			
The like for the other Defendants, 15 Brief Sheets -	2	10	0			
Fee to Mr. Roupell, to peruse the Pleadings on Behalf of the Defendant, the Heir at Law -	2	2	0	2	2	0
His Clerk - - - -	0	2	6	0	2	6
Attending him - - -	0	6	8	0	6	8
Fee to Mr. Maddock, to perusing the Pleadings on Behalf of the Defendant, the Mortgagee	2	2	0	2	2	0
His Clerk - - - -	0	2	6	0	2	6
Attending him - - -	0	6	8	0	6	8
Taking Instructions for Interrogatories to prove the Execution of the Mortgage - -	0	13	4			
Drawing the same - -	0	12	0			
Fair Copy thereof for Counsel to settle and sign, fol. 12 (a) -	0	4	0	0	4	0
Fee to Mr. Maddock, and Clerk therewith - - -	1	3	6	0	2	6
Attending him - - -	0	6	8			
Engrossing Interrogatories -	0	6	0			
Paid for Parchment and Duty	0	10	0			
Instructions for Counsel to move to enlarge Publication for a Month	0	2	6			
Fee to Mr. Maddock to move	0	10	6			
Attending him with Instructions, and attending the Register to draw up and enter Order -	0	6	8			
Paid for Order, Entry, Copy, and Service - - - -	0	10	6			
Term Fee, Clerk, and Solicitor	0	16	8			
Letters and Messengers -	0	5	0			

(a) One Shilling per Folio drawing, includes the Fair Copy.

CHARGE.			TAX OFF.		
£	s.	d.	£	s.	d.

MICHAELMAS VACATION FOLLOWING.

Attending at several Places to find one of the Witnesses to the Deed, when I learnt he was out of the Kingdom - - -	0	6	8		
The Defendant Joseph Williams being the other Witness to the Deed, drawing Instructions for Counsel to move that he might be examined for the Defendant, the Mortgagee, saving just Excep- tions - - -	0	2	6		
Fee to him therewith -	1	1	0	0	10 6
Attending him with Instructions, and attending Register to draw up and enter Order -	0	6	8		
Paid for Order, Entry, Copy and Service - - -	0	10	6		
Attending the Defendant to the Exa- miner's, to be sworn and exa- mined, and instructing the Exa- miner - - -	0	6	8		
Paid the Examiner's Bill -	1	14	2		
Paid for Office Copy of the Plain- tiff's Depositions, fol. 19	1	12	6		
Abbreviating the Depositions, fol. 36	0	12	0		
Making two fair Copies for Counsel to add to the Briefs for the Exe- cutors, three Sheets each ,	1	0	0		
Making one Copy thereof, to add to the Briefs for the Heir at Law	0	10	0		
The like to add to the Brief for the Mortgagee - - -	0	10	0		
Letters and Messengers -	0	2	0	0	2 0

CHARGE.			TAX OFF		
£	s.	d.	£	s.	d.

HILARY TERM, 1821.

Fee to Mr. Hart and Clerk, with Brief for the Defendants, the Ex- ecutors - - -	10	12	6
Attending him - - -	0	6	8
Fee to Mr. Bell and Clerk, with Brief for them - - -	5	7	6
Attending him - - -	0	6	8
Fee to Mr. Shadwell, with Brief for Defendant, the Heir at Law and Clerk - - -	4	6	6
Attending him - - -	0	6	8
Fee to Mr. Sugden, with Brief for Defendant, the Mortgagee, and Clerk - - -	4	6	6
Attending him - - -	0	6	8
Fee to Mr. Maddock, with Brief for the other Defendants, and Clerk	5	7	6
Attending him - - -	0	6	8
March 9th and 10th. Attending Court each of these Days; the Cause in the Paper, but not called on, Clerk in Court and Solicitor	1	6	8
—— 11th. Attending Court, Clerk in Court, and Solicitor, Cause called on, and Part heard -	1	0	0
—— 12th. Attending the Court when the Cause was fully heard, and the Decree made, Clerk, and Solicitor - - -	1	0	0
Paid Court Fees, and Officers (a)	0	13	0

(a) Only 10s. are allowed by Lord Hardwicke's Orders, 1743, for all the Defendants whether they appear by different Solicitors

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Paid for a Copy of the Minutes	0	12	0			
Making a Copy thereof -	0	3	6	0	3	6
Perusing the same, and attending the Plaintiff's Solicitor, on his requesting to have an Alteration made therein, and attending with him to the Register Office thereon - -	0	13	4			
The Plaintiffs having given a Notice of Motion to rectify the Minutes, perusing Papers, and taking Instructions to draw Brief thereon	0	6	8			
Drawing same, and fair Copy for Counsel - -	0	10	0			
Copy of the Minutes for him	0	3	6			
Fee to Mr. Maddock, with Brief, and Clerk - -	1	8	6	0	2	6
Attending him . -	0	6	8			
Attending the Court on Motion, when the Minutes were ordered to be rectified - -	0	6	8			
Attending the Register to have the Minutes rectified, agreeable to the Order - -	0	13	4			
Paid for a Copy of the Minutes as rectified - -	0	13	0			
Perusing and considering the same, and attending the Plaintiffs' Soli-						

or by one Solicitor only; but the Practice has now extended it to 13s. for every different Solicitor, and Lord Eldon has decided that a continued Practice nullifies a Written Order (a), and the Fee is now allowed to each Solicitor.

(a) 1 Ves. and Bea. 327.

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
citor, and the Register finally settling the same -	0	6	8			
Paid for Office Copy of the Decree	5	8	6			
Attending the Register, examining and passing the Decree, the whole Morning - -	0	13	4			
Attending the Defendants, the Executors, conferring and advising on the Decree, and on the further Proceedings in consequence	0	6	8	0	6	8
Term Fee, Clerk, and Solicitor	0	16	8			
Letters and Messengers -	0	5	0			

EASTER TERM, 1821.

Paid for a Copy of Interrogatories left for the Examination of the Defendants the Executors	0	10	8			
Perusing and considering the same	0	6	8	0	6	8
Making a Copy thereof for each of the Defendants, the Executors(a)	0	5	4	0	5	4
Attending them, advising thereon, and Instructing them in the Manner in which the Answer thereto must be drawn -	0	13	4	0	6	8
May 14th. Attending a Warrant to settle the Interrogatories, when the same were allowed -	0	6	8			
Term Fee, Clerk, and Solicitor	0	16	8			
Letters and Messengers -	0	5	0			

TRINITY TERM, 1821.

Attending the Defendants, the Exe-

(a) These Copies are not allowed between Party and Party, nor between Solicitor and Client, unless expressly directed.

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
cutors, taking Instructions for						
Answer to the Interrogatories	0	13	4			
Drawing the same, fol. 230	11	10	0			
Fair Copy thereof for the Defend-						
ants, the Executors' Perusal (a)	3	13	6	3	13	6
Attending them afterwards, going						
through and settling the same	0	13	4			
Fee to Mr. Maddock to settle and						
sign the same, and Clerk (b)	3	5	6	0	2	6
Attending him - - -	0	6	8			
Engrossing the same, fol. 230	5	15	10			
Paid for Parchment and Duty Six						
Skins - - - - -	3	8	6			
Attending the Defendants, reading						
the same over to them, before						
sworn thereto - - -	0	13	4			
Paid Oaths - - - -	0	2	0			
Paid on leaving the same -	0	5	0			
Attending Defendants to the Public						
Office to be sworn thereto	0	6	8			
Warrant on leaving Copy and Ser-						
vice - - - - -	0	4	6			
The Plaintiffs having obtained an						
Order to refer the Examination						
to the Master for insufficiency,						
attending Warrant thereon, when						
the Master required a further						
Answer to be put in to the Inter-						
rogatories - - - -	0	6	8			
Attending the Defendants severally,						

(a) Fair Copies are included in the Allowance of 1s. per Folio drawing, and are never allowed where Counsel draws the Pleadings, nor in Town Causes.

(b) The Signature of Counsel is not necessary. 18 Ves. 287.

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
taking Instructions for further Examination - -	0	13	4			
Drawing same, fol. 12 -	0	12	0			
Fair Copy thereof for Counsel (a)	0	4	0	0	4	0
Attending the Defendants, reading over and settling the same	0	6	8	0	6	8
Fee to Mr. Beames, to settle and sign the same, and Clerk (b) -	1	3	6	1	3	6
Attending him - -	0	6	8			
Engrossing further Examination	0	12	0			
Paid for Parchment and Duty	0	10	6			
Attending the Defendants reading over the same, and afterwards to the Master's Office to get them sworn thereto - -	0	6	8	0	6	8
Paid Oath - -	0	2	0	0	2	0
Paid on leaving Examination	0	5	0	0	5	0
Warrant on leaving the same, Copy, and Service - -	0	4	6			
The Plaintiff's Solicitor having taken out a Warrant for the Defendants the Executors, to produce the Books and Papers, &c. attending them thereon, and selecting out the same for that Purpose, and taking Instructions for Affidavit of Production - -	0	6	8			
Drawing Affidavit, fol. 15 -	0	15	0			
Fair Copy for the Defendant (c)	0	5	0	0	5	0

(a) Fair Copies are included in the Allowance of 1s. per Folio drawing, and are never allowed where Counsel draws the Pleadings, nor in Town Causes.

(b) The Signature of Counsel is not required.

(c) This is not allowed between Party and Party, nor between Solicitor and Client, unless expressly directed.

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Attending them, reading over and settling the same -	0	6	8			
Engrossing the Affidavit, and paid for Paper and Duty -	0	7	8			
Attending the Defendants, reading over the same, and afterwards to the Master's Office to get them sworn thereto, and to leave Books and Papers, &c. -	0	13	4			
Paid Oaths - -	0	2	0			
Attending swearing Parties thereto	0	6	8			
Paid the Master's Clerk comparing the Schedule to the Affidavit with the Books and Paper left	0	6	8			
Paid for a Box for the same	0	3	6			
Paid for the Master's Certificate of Books, &c. being left -	1	10	0			
Attending for Certificate, and filing	0	6	8			
Paid filing and for Office Copy	0	5	10			
Warrant on leaving Copy, and Service - -	0	4	6			
Attending the Plaintiff's Warrant to inspect the Books and Papers left	0	6	8			
Paid for a Copy of the Charge of the Personal Estate against the Defendant Wilson, fol. 80	2	0	0			
Making a Copy thereof for the said Defendant (a) -	0	13	4	0	13	4
Perusing and considering the same, and attending the said Defendant conferring and advising thereon	0	6	8			

(a) These Copies are never allowed between Party and Party, nor between Solicitor and Client, unless expressly directed.

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Paid for a Copy of the like Charge against the Defendant Johnson, fol. 26 - -	0	13	0			
Making a Copy thereof for the said Defendant (a) - -	0	4	4	0	4	4
Perusing and considering the same, and attending him conferring and advising thereon -	0	6	8	0	6	8
June 6th. Attending Warrant on each Charge and proceeded	0	13	4			
June 8th. Attending another War- rant on each Charge, when the same were allowed -	0	13	4			
Attending the Defendants severally taking Instructions for their Dis- charges - -	0	6	8	0	6	8
Drawing the Discharge of the De- fendant Wilson, fol. 41	1	7	4			
Warrant on leaving same, Copy, and Service -	0	4	6			
Drawing the Discharge of the De- fendant Johnson, fol. 18	0	13	0			
Warrant on leaving same, Copy, and Service - -	0	4	6			
Warrant to proceed thereon, Copy, and Service - -	0	4	6			
Warrant to proceed on the Defen- dant Wilson's Discharge, Copy, and Service - -	0	4	6			
— 16th. Attending both War- rants, and proceeded -	0	13	4			

(a) These Copies are never allowed between Party and Party,
nor between Solicitor and Client, unless expressly directed.

FOR DEFENDANTS.

493

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Another Warrant to proceed on each of the Discharges, Copies, and Service - -	0	9	0			
June 18th. Attending each Warrant, when the Discharges were allowed - -	0	13	4			
Attending the Defendant Venables, the Mortgagee, advising on the Account made out by him of the Money due on his Mortgage, and taking Instructions to prepare Charge thereon - -	0	6	8	0	6	8
Drawing the same, fol. 4 -	0	2	8			
Warrant on leaving the same, Copy and Service - -	0	4	6			
Warrant to proceed thereon, Copy, and Service - -	0	4	6			
Attending thereon, when the Charge was allowed - -	0	6	8			
Drawing and fair Copy Defendant Venables' Costs at Law in the Action by Harvey, fol. 12	0	8	0			
Warrant on leaving Copy, and Service - -	0	4	6			
Warrant to proceed, Copy, and Service - -	0	4	6			
Attending thereon, and the Master refused to allow same unless taxed	0	6	8			
Summons to tax, Copy, and Service	0	4	0			
Attending taxing same as between Attorney and Client, when the Bill was reduced from 33 <i>l.</i> 15 <i>s.</i> 7 <i>d.</i> to 20 <i>l.</i> 6 <i>s.</i> 6 <i>d.</i> - -	0	6	8			
Paid Master at the Exchequer	0	4	0			

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Warrant on leaving the Master's Al- locatur of Costs taxed -	0	4	6	0	4	6
Paid for a Copy of a Claim of Debt made by John Stephens, a Credi- tor on Bond, and several Notes of Hand, fol. 10 -	0	5	0			
Paid for Copy of Affidavit made in Support thereof, fol. 8 -	0	4	0			
Making a Copy thereof, sent to the Defendants, the Executor (a)	0	2	8	0	2	8
Attending them, conferring and ad- vising thereon -	0	6	8	0	6	8
Attending with them on the Plain- tiff's Warrant to inspect the Books and Papers, &c. when it appeared there was a Debt due to the De- ceased from Mr. Stephens, which should be set off against his Claim on the Notes -	0	6	8			
June 14th. Attending a Warrant on the Creditor's Claim, when his Demand on the Estate was settled	0	6	8			
Paid for a Copy of the Proposal for the Maintenance of the Plaintiffs, the Infants, fol. 10 -	0	5	0			
The like of Affidavit in Support thereof, fol. 10 -	0	5	0			
Making Copies thereof for the De- fendants the Executors (b)	0	6	8	0	6	8

(a) Fair Copies are not allowed between Party and Party, but at the express Direction of the Party requiring them, as between Solicitor and Client, and then charged at 4d. per folio.

(b) Ibid.

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Attending them, conferring and advising thereon, and as to the Propriety of allowing the Sums mentioned in their Proposal for Maintenance -	0	6	8			
Attending a Warrant on the Proposal, when the same was allowed	0	6	8			
The Plaintiffs having obtained an Order for a separate Report, in order to procure the Maintenance for the Plaintiffs, the Infants, paid for Copy of the Report, fol. 80 - -	2	5	0			
Making a Copy thereof (a)	1	10	0			
Perusing and considering the same, and making several Alterations and Corrections therein -	0	13	4			
Attending the Defendants, the Executors, conferring and advising thereon - -	0	6	8	0	6	8
Attending three Warrants to settle the Report, when the same was settled - -	1	0	0			
Paid for a Copy of the Plaintiffs' Charge against the Defendant Johnson, for Rent and Profits of Testator's Estates received by him, fol. 12 -	0	6	0			
Copy thereof for the Defendant (b)	0	4	0	0	4	0

(a) Fair Copies are never allowed but in Country Causes, or where the Party requests them, as between Solicitor and Client.

(b) Ibid.

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Paid Clerk in Court for an Office Copy of the Depositions of Wit- nesses, taken under the Commis- sion, fol. 66. - -	3	17	0			
Abbreviating the same -	1	2	0			
Perusing and considering the same, and making Minutes thereon	0	13	4			
Attending the Defendants, the Exe- cutors, conferring and advising thereon - -	0	6	8	0	6	8
Paid for a Copy of Mr. Morgan's Deposition of the Value of the contingent Interest, fol. 8	0	7	4			
Abbreviating the same -	0	2	8			
Paid for a Copy of the Plaintiffs' State of Facts respecting the Free- hold and Leasehold Estates of which the Testator died seised or possessed, fol. 16 -	0	8	0			
Fair Copy thereof for the Executors and Devisees in Trust (a)	0	5	4	0	5	4
Attending a Warrant thereon, when the same was allowed -	0	6	8			
Paid for a Copy of the Particular of the Estates to be sold, fol. 15.	0	7	6			
Attending the Plaintiffs' Warrant thereon, when the same was set- tled - -	0	6	8			
Attending Warrant to fix a Time for the Sale, when the 26th Ja- nuary, at six, was appointed	0	6	8			

(a) Fair Copies are never allowed between Party and Party, but in Country Causes, or where the Party requests them, as between Solicitor and Client.

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Paid for a Copy of the State of Facts, respecting the Rentals, and Values of the Estates, and also the Value of the contingent Interest in the Sum charged thereon, fol. 24 - -	0	12	0			
Copy thereof for the Defendants, the Executors (a) -	0	8	0	0	8	0
January 12th. Attending them, conferring and advising thereon, and on Objections to be made thereto - -	0	6	8			
— 14th. Attending a Warrant on the State of Facts and proceeded - -	0	6	8			
— 16th. Attending another Warrant thereon, when the Master allowed the State of Facts	0	6	8			
Paid for a Copy of the Plaintiffs' Bill of Costs, up to the Hearing, fol. 68 - -	1	14	0			
Attending three Warrants, taxing same, (b) Clerk in Court, and Solicitor - -	2	0	0			
Paid for a Copy of the Costs of the Defendants, the Assignees of William Lawrence, fol. 16 -	0	8	0			
Attending taxing same, Clerk in Court, and Solicitor -	0	13	4			

(a) See Note, p. 498.

(b) The Clerk in Court's *personal* Attendance is indispensably required to warrant the Charge for him; he cannot attend by a Substitute or Deputy, and the Charge for such an Attendance if insisted upon must be taken off.

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Paid for a Copy of the Costs of the Defendant Charles Williams, fol. 40	1	0	0			
Attending two Warrants, taxing same, Clerk in Court and Solicitor	1	6	8			
Drawing Bill of Costs and Copy, fol. 52	1	14	8			
Warrant on leaving same, three Copies and Services	0	7	6			
Attending three Warrants, taxing the same, Clerk in Court, and Solicitor	2	0	0			
Term Fee, Clerk, and Solicitor	0	16	8			
Letters and Messengers	0	5	0			

HILARY TERM, 1822.

January 26th. Attending the Sale of the Estates at the Public Sale-Room	0	13	4	0	6	8
Paid for a Copy of further Charge against the Defendant Johnson, for Rents and Profits, fol. 6.	0	3	0			
Attending a Warrant thereon, when the same was allowed	0	6	8			
Drawing Discharge in respect thereof, fol. 4	0	2	8			
Warrant on leaving Copy, and Service	0	4	6			
Warrant to proceed on Discharge, Copy, and Service	0	4	6			
Attending Warrant thereon, when the same was allowed	0	6	8			
Paid for a Copy of the Master's General Report, fol. 150	3	15	0			

FOR DEFENDANTS.

501

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Making a Copy thereof (a) -	2	10	0			
Perusing and considering the Report, and making several Alterations and Corrections therein	0	13	4			
Attending ten Warrants to settle the same - - -	3	6	8			
Drawing Brief for Counsel for the Defendants, the Executors, on the Cause coming on for further Directions, seven Brief Sheets	2	6	8			
Making two fair Copies thereof for Counsel - - -	2	6	8			
To Mr. Hart and Clerk, with Brief	7	9	6			
Attending him - - -	0	6	8			
To Mr. Bell and Clerk, with Brief	3	5	6	0	2	6
Attending him - - -	0	6	8			
Drawing Brief for the Defendant, the Mortgagee, five Sheets	1	13	4			
Fair Copy thereof for Counsel	0	16	8			
To Mr. Maddock and Clerk therewith - - -	3	5	6			
Attending him - - -	0	6	8			
Drawing Brief for the other Defendants, five Sheets -	1	13	4			
Fair Copy thereof for Counsel	0	16	8			
To Mr. Beams and Clerk therewith, for the Heir at Law -	2	4	6			
Attending him - - -	0	6	8			
To Mr. Sugden, and Clerk therewith, for the other Defendants	2	4	6			
Attending him - - -	0	6	8			
February 24th. Attending Court,						

(a) Copies are not allowed ; but under the Circumstance before mentioned, this Charge is in general allowed.

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Cause in the Paper, but not called on, Clerk in Court, and Solicitor	0	13	4			
February 25th. The like, Clerk in Court, and Solicitor, Cause heard, and Order made -	1	0	0			
Paid Court Fees, and Officers	0	13	0			
Paid for a Copy of the Minutes	0	15	0			
Perusing and attending the Register, settling the same -	0	13	4			
Paid for an Office Copy of the Order	4	3	6			
Perusing same, and attending the Register examining it, and on passing the original Decree	0	13	4			
Term Fee, Clerk, and Solicitor	0	16	8			
Letters and Messenger -	0	5	0			

EASTER TERM, 1822.

Attending the Accountant-General receiving Costs -	0	6	8	0	6	8
Paid filing Certificate of Payment thereof - -	0	4	6			
Paid for a Copy of John Stephen's Claim of subsequent Interest on his Debts, proved in the Cause, fol. 3 - -	0	1	6			
Attending Warrant thereon, when the same was allowed -	0	6	8			
Paid for a Copy of the Conveyance from the Defendant, the Mortgagee, left with the Master, fol. 90 - -	3	0	0			
Perusing and considering the same, and comparing the same with the Deeds and Proceedings in the Cause, six Skins -	1	10	0			

FOR DEFENDANTS.

503.

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Paid for a Copy of the Assignment of the Term, fol. 45 -	1	10	0			
Perusing and considering and com- paring the same with the Deeds, three Skins - -	0	15	0			
Paid for a Copy of the Lease for a Year, fol. 15 -	0	10	0			
Perusing and considering the same	0	6	8			
Attending Warrant to settle the Lease for a Year, when the same was allowed - -	0	6	8			
Attending two warrants to settle the Release, when the same was allowed - -	0	13	4			
The like of Assignment of the Term	0	13	4			
Drawing Charge of subsequent In- terest due to the Defendant, the Mortgagee, fol. 3 -	0	2	0			
Warrant on leaving the same, Copy, and Service - -	0	4	6			
Warrant to proceed thereon, Copy, and Service - -	0	4	6			
Attending thereon, when the Charge was allowed - -	0	6	8			
Attending the Defendant, the Mort- gagee, reading over, and execut- ing all the Deeds (a) -	1	0	0	0	6	8
The Plaintiffs having given a Notice of Motion that the Defendants, the Executors, might pay in their Balances in a Fortnight, attend- ing the Defendants thereon, when						

(a) The Fee for examining the Ingrossment of Deeds with the Draft is 10s. for every three Skins.

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
they directed me to apply for longer Time - - -	0	6	8	0	6	8
Attending the Plaintiffs' Solicitor thereon, when he refused to con- sent to any longer Time -	0	6	8	0	6	8
Drawing Brief for Counsel on Mo- tion - - -	0	6	8			
Copy thereof - - -	0	3	4			
Copy of Notice of Motion annexed	0	1	0	0	0	6
Fee to Mr. Maddock therewith	1	1	0			
Attending him -	0	6	8			
Attending Court on Motion, when an Order was made that the Mo- ney should be paid into Court within a Month - -	0	6	8			
Attending the Defendants, the Exe- cutors, conferring and advising on a Writ of Execution of the Order served on them, and the Necessity of their immediately paying the Money into Court	0	6	8	0	6	8
Attending them afterwards, on an Attachment being issued, and ad- vising thereon, when they fur- nished me with the Money to pay the same - - -	0	6	8	0	6	8
Drawing Notice of Motion for Leave to pay the Money into Court, Copy and Service -	0	4	0	0	4	0
Drawing and engrossing Affidavit of the Service thereof, Duty, and Oath - - -	0	6	7	0	6	7
Paid filing the same, and for an Office Copy thereof -	0	5	7	0	5	7

FOR DEFENDANTS.

505

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Drawing Brief for Counsel to move, and fair Copy for him -	0	10	0	0	10	0
Fee to him therewith -	1	1	0	1	1	0
Attending him -	0	6	8	0	6	8
Attending Court, when an Order was made to pay the Money into Court in a Week -	0	6	8	0	6	8
Paid for Order, Entry, Copy, and Service -	0	13	0	0	13	0
Attending the Register passing the same -	0	6	8	0	6	8
Attending at the Accountant-Gener- al's for Directions, and at the Bank, for the Purpose of paying the Money into Court -	0	6	8			
Paid for Certificate of paying in the Principal by the Defendant Wil- son, filing same, and for Office Copy -	0	10	0			
The like of Interest -	0	4	10			
The like Certificates of Payment by the Defendant Johnson -	0	9	8			
The like of Rents and Profits paid in by him -	0	4	10			
Attending taxing and settling the Costs of Contempt -	0	6	8	0	6	8
Paid for a Copy of the Plaintiffs' Proposal for a Receiver, fol. 4	0	2	0			
Attending several of the Defendants, conferring and advising thereon, and on the Propriety of opposing the Appointment, and proposing some other Person -	0	6	8			
Drawing Counter Proposal for Re- ceiver, fol. 5 -	0	3	4	0	3	4

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Warrant on leaving same, Copy, and Service -	0	4	6	0	4	6
Attending the Plaintiffs' Warrant thereon, when the Master rejected the Proposal -	0	6	8	0	6	8
Attending Warrant on the Plaintiffs' Proposal, when the Master allowed the same -	0	6	8			
Paid for a Copy Draft Recognizance and Affidavit of Sureties, fol. 16	0	8	0			
Attending settling same -	0	6	8			
Paid for Copy Report, approving Proposal and Recognizance, fol. 8	0	4	0			
The like of Report, appointing Receiver, fol. 9 -	0	4	6			
Attending settling the same -	0	6	8			
Paid for a Copy of the Plaintiffs' Costs subsequent to the Hearing, fol. 106 -	2	13	0			
Attending four Warrants, taxing same, Clerk in Court, (a) and Solicitor -	2	13	4			
Paid for a Copy Bill of Costs of the Defendants, the Assignees of William Lawrence, fol. 40	1	0	0			
Attending two Warrants, taxing same, Clerk in Court, and Solicitor	1	6	8			
Paid for a Copy Bill of Costs of the Defendant Charles Williams, fol. 30 -	0	15	0			

(a) The Clerk in Court is supposed here to have attended in Person: if his Writer, or Agent, or Clerk attend, the Charge of 6s. 8d. each Warrant must be taken off.

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Attending taxing the same, Clerk in Court, and Solicitor -	0	13	4			
Drawing this Bill of Costs and Copy, fol. 68 -	2	5	4			
Warrant on leaving the same, three Copies, and Service -	0	7	6			
Two Warrants to tax same, three Copies, and Service -	0	15	0			
Attending taxing same, Clerk in Court, and Solicitor -	1	6	8			
Attending to receive the Costs, and to file the Certificate thereof (a)	0	6	8	0	6	8
Paid filing the Certificate -	0	4	6			
Term Fee, Clerk and Solicitor	0	16	8			
Letters and Messengers -	0	5	0			

Bill of Messrs. Collins and Keene, Attornies for John Harvey, Esq. in the Action against Defendant Venables, for Non-performance of an Agreement for renting Part of the Mortgaged Premises, taxed as between Attorney and Client, as directed by the Master.

In the Exchequer.

Harvey against Venables.

MICHAELMAS TERM, 1820.

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Attending John Harvey, Esq. advising on an Agreement between him, and James Bakewell, Esq.						

(b) This Fee is never allowed even between Solicitor and Client.

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
for a Farm at Kingston -	0	6	8	}	0	6
Perusing and considering Agreement -	0	6	8			
1818. Writing several Letters to Mr. Venables, endeavouring to convince him of the Propriety of putting Mr. Harvey in possession of the Farm, and Copies -	2	2	0		1	11
Perusing very long Correspondence between Mr. Bakewell and Mr. Venables, and making Extracts therefrom, and Copies -	2	2	0		1	8
1819. Not being able to obtain any thing satisfactory, the Expence of a Writ, Copy, and many fruitless Attempts to serve it by Agent	3	3	0		1	1
Almost numberless Attendances on John Harvey, Esq. and advising him from Time to Time in this Business -	2	2	0		2	2
1820. As Mr. Bakewell was going to Town, who undertook to serve it, the Expence of another Writ, Copy, &c. -	3	3	0		1	11
Affidavit of Service -	0	8	6		0	0
Letters and Messengers -	0	4	0			
Writing to Agent to retain Mr. Dauncey -	0	3	6		0	3
Agent's Attendance on him, but he was retained by Defendant	0	6	8		0	6
Writing to Agent to retain Mr. Abbot -	0	3	6		0	3
Agent's Attendance on him	0	6	8			
Gave him his Fee, and Clerk	1	3	6			
Searching for Appearance -	0	3	4			

FOR DEFENDANTS.

509

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Instructions to declare -	0	6	8			
Drawing Declaration, fol. 42	2	2	0			
Mr. Abbot to settle -	1	1	0			
Attending him - -	0	6	8	0	3	4
Copy Opinion - -	0	1	0			
Close Copy Declaration -	0	14	0			
Perusing and considering same, and making many Alterations as to Facts - -	0	13	4	0	13	4
Fair Copy as altered -	0	14	0	0	14	0
Ingrossing and Duty -	1	1	5			
Entering - -	0	13	4			
Rule to Plead 3s. 10d. Demand of Plea 2s. - -	0	5	10			
Attending Summons for Time, and Copy Order - -	0	4	4			
Copy General Issue -	0	1	0			
Term Fee - -	0	18	0			
Correspondence with Messrs. Birch and Foster, Attendances on them, and on Plaintiffs, when it was agreed to refer the cause to Mr. Pearson - -	2	2	0			
Drawing, engrossing and attending the Execution of Agreement and Stamp - -	2	2	0			
Many Attendances afterwards, and Correspondence, when the Damages were fixed at Eighty Guineas - -	2	2	0	1	1	0
Postage and Carriage and Messengers - -	1	1	0	1	1	0
Attending Summons to tax Bill, and Copy Order -	0	4	4			
Bill of Costs and Copy -	0	6	0			

510 BILL OF COSTS FOR DEFENDANTS.

			CHARGE.			TAX OFF.		
			£	s.	d.	£	s.	d.
Attending taxing	-	-	0	6	8			
Paid the Master	-	-	0	4	0			
			<hr/>					
			33	15	7			
			13	9	1			
			<hr/>					
			20	6	6			

Allow for Costs 20l. 6s. 6d.

John Dax.

Bill of Costs of a Defendant served with Subpoena, and no Bill filed.

In Chancery.

Lawrence and others v. Wilson and others.

HILARY TERM, 1820.

				£	s.	d.
Searching if Bill filed	-	-	-	0	3	4
Attending to prefer Costs, and Term Fee	-			0	16	8
Drawing Bill of Costs, and Copy for the Master				0	1	0
Attending to tax same	-	-	-	0	6	8
Paid the Master	-	-	-	0	2	6
Entering Bill at the Register Office	-			0	1	4
Paid for Subpoena	-	-	-	0	8	6
Personal Service on Plaintiff			-	0	10	0
				<hr/>		
				2	10	0

These Costs must be preferred in the Term in which the Subpoena is returnable, or before the second Seal after, when the Line is struck by the Six Clerk, in his Office Book. In a Town Cause they are taxed £1 6s. 8d.; and in a Country Cause, £1 13s. 4d.

PRACTICAL DIRECTIONS.

AND

REMARKS

RELATING TO THE FOREGOING

Bill of Costs;

*And to the Proceedings in General on the Part of
a Defendant in the Court of Chancery, in a Suit
for the Administration of Assets.*

HILARY TERM, 1820.

IN treating of the Defence to Suits, it may be sufficient for the Purpose of this Work, to observe generally, that where the Interests of the Crown, or of those under its immediate Protection, as the Objects of a Public Charity, are in question; the King's Attorney-General, or during a Vacancy, the Solicitor-General, becomes a necessary Party to support those Interests (a): all other Bodies Politic and Corporate, and Persons of full age, not being Married Women, or Idiots, or Lunatics, defend a Suit by themselves (a). *A Married Woman*, defends a Suit jointly with her Husband, but if her Claims are in Opposition to those of her Husband, or if she lives separate from him (b); or cannot in Conscience consent to the Answer drawn up by him, or disapproves the Defence he wishes her to make (c);

(a) Red. Ch. Pl. 81.

(b) Pre. Ch. 429.

(c) 2 Atk. 50. 2 Eq. Ca.

Abr. 66.

she may obtain an Order for leave to defend separately (*a*) ; and her Answer may be read against her (*b*) ; but if a Husband file a Bill against his Wife, treating her as a *femme sole*, an Order is not required (*c*) : nor where the Husband is in Exile, or is an alien Enemy, or has abjured the Realm (*d*), or is out of the jurisdiction of the Court, and not to be found, or the Wife is Sued in respect of her separate Estate (*e*) ; but where a Woman has married merely to Defraud her Creditors (*f*), or obstinately Refuses to join in Defence with her Husband, she may be compelled to make a separate Defence, and an Order may be obtained to issue Process against her separately (*g*). *An Infant* defends a Suit by Guardian, appointed upon his personal Appearance in Court, or by Commission (*h*). *Idiots and Lunatics* defend by their Committees, who unless interested in the Matters in question, are by Order of Court appointed Guardians for that Purpose as of course (*i*) ; but if interested, or if no Committee has been appointed, or the Committee refuses to act, the Court will by Order appoint a Committee for the Purpose of defending the Suit (*k*) ; so if a Defendant by Age or Infirmary be reduced to a Second Infancy, or be in the Condition of an Idiot or Lunatic, though not found such by an Inquisition, the Court will upon Affidavit of his incapacity, or Evidence *aliunde*, appoint a Guardian *ad litem* (*l*). *A Defendant in a State of Poverty*, and, as such, incapable of defending a Suit : before Appearance, or in any Stage of a Suit, may

(*a*) 1 Ch. Rep. 68. 2 P.
Wms. 371.

(*b*) 3 Atk. 646. 1 Ves. 383.

(*c*) 3 Atk. 478.

(*d*) 2 Vern. 204. 3 P.
Wms. 37.

(*e*) 2 Vern. 613. Pre. Ch.
328. Dick. 410.

(*f*) Dick. 410.

(*g*) 1 Ch. Ca. 296. Red.
Cha. Pl. 84.

(*h*) Red. Ch. Pl. 82.

(*i*) Coop. Pl. 32, 109.

(*k*) Dick. 460. Red. Ch.
Pl. 94.

(*l*) 14 Ves. 172. 1 Fowl.
Exch. 478.

obtain an Order to defend *in formâ pauperis* (a) on Motion as of course, or more usually by Petition to the Master of the Rolls, founded on *his own* Affidavit “that he is not worth Five Pounds in the World, his just Debts being first paid, his Wearing Apparel and Matters in question excepted;” but no Certificate by Counsel of *his just Cause of Suit* is required, as in the Cause of a Pauper Plaintiff; an Order made upon the Affidavit of a third Person, and not of the Pauper, has been discharged for irregularity, and the Party dispaupered (b): and so where the Pauper was shewn to be in possession of the Land in question (c); the Privilege has been held to extend only to Persons suing in their own Right, and not in *autre droit* as *Prochein Ami*, (d), or as *Executor* or *Administrator* (e); on a very recent Occasion, where a Pauper Party sustained the mixed Character of Executor and Legatee, the Question was much considered, and Lord Eldon held that it formed an Exception to the general Rule; but to prevent any undue Practice in suing generally *in forma pauperis*, and under Colour of the Privilege of obtaining Dives Costs, that a Special Order was necessary to enable the Pauper to proceed in that Character as to the Legacy (f). When the Pauper is once admitted, the Court is very tender of depriving him of his Privilege, by dispaupering (g).

In this place, it may be useful to remark, that by a Decision of Lord Eldon, a Solicitor, in the Exercise of the *general Authority* given him by his Client, *may defend a Suit*, but he cannot *institute a Suit* without an *Authority in Writing* for that Purpose; and if there be only Assertion against Assertion, the Solicitor having neglected to secure

(a) 11 Hen. VII. and 23 (e) Dick. 136. Beam. Costs,
Hen. VIII. Ord. Can. Bea. 78. 93. 124.
Ed. 44. 215. 507.

(b) 2 Bro. C. C. 272.

(f) Thompson v. Thompson.
Hil. 1824.

(c) 11 Ves. 49.

(g) 13 Ves. 511, 516. 16

(d) 1 Ves. 410.

Ves. 407.

himself by an *Authority in Writing*, must abide the Consequences of his Neglect (a).

The Appearance of a Defendant is voluntary, or compulsory when enforced by Process.

If the Defendant lives in London, or within twenty Miles, the Cause is termed a *Town Cause*; and if he has been served with a Subpœna four Days or more before the Return of the Writ, he has until the Return-day to enter his Appearance; if served on the Return-day, or only a Day or two before, he has four Days, exclusive of the Day of Service, to appear (b); and so, if he be served with a Subpœna *returnable immediately*, within ten Miles of London, (the distance to which that Process is restricted,) he must enter an Appearance within four Days, exclusive of the Day of Service: but where the Defendant lives above twenty Miles (which is termed a *Country Cause*) he is allowed eight Days exclusively to appear, calculated in like manner from the Return or Service of the Subpœna; but a Party is not bound to appear till the Return of the Subpœna. It is laid down in a Work of great Practical Information, revised by an Author of distinguished Merit, that if the Subpœna be returnable on the last Day of Term, the Defendant is at liberty to appear the first Return of the Term following (c). A Party to a Bill may dispense with the Service of the Process, and come in voluntarily and appear *gratis*, and be entitled to his Costs as if regularly served with a Subpœna; but it should be remarked, that although a Defendant is not obliged to enter his Appearance before the Return of the Process, yet if he does so before he is regularly required by the Course of the Court, he will be in Contempt for want of Answer after the eight Days exclusively from his Appearance (d); it being decided that the Time allowed by the Rules of the Court after Appearance applies to the *Actual Appearance*, without regard

(a) 3 Meri. 12. 1 Ves. j. 196.

(c) Prac. Reg. Wy. Ed. 36.

(b) Ord. Cano. Bea. Ed. 169.

(d) 5 Madd. 422.

to the Motive (a). As a general Rule, if the Defendant appears it cures all Irregularities in the Service of the Subpoena (b); but an Appearance by Counsel, *merely* to object to the Irregularity of a Notice of Motion given before Service of a Subpoena, has been held not to be a Waiver of the Irregularity, *the Plaintiff* until Service of the Subpoena *not being in a Condition* to move or give Notice of Motion (c). And it seems to have been decided, that if the Subpoena be served on the Eve of the long Vacation, and the Defendant chooses rather to appear than be liable to an Attachment, he is still at liberty to insist upon not being served at all, or that he was irregularly served (d); as addressed to a junior Practiser, it may be useful to observe, that if he intends to avail himself of any Irregularity in the Issuing or Service of the Subpoena or Attachment, or any previous Proceeding, the Court has held it imperative upon him to take the Objection *promptly* (e); thus, in the Instance of an Appearance entered as in a *Town Cause* to an Attachment issued upon a Subpoena irregularly served upon a Defendant residing two hundred Miles from London, after the Appearance it was held too late to complain of the Irregularity, the Objection should have been taken *in limine*, and the Application should have been to set aside the Attachment previous to an Appearance being entered (f). Where Husband and Wife are served with Subpoena, or the Husband only with Notice that his Wife is a Defendant, he must enter an Appearance for both (g). And if the Husband be beyond Sea, and not amenable, and the Wife only be served with Subpoena, and appear

(a) 1 Sim. and Stu. 136.

(b) 3 Atk. 569.

(c) Lampard v. Padfield,
Michas. 1823, MSS.

(d) 3 Atk. 567.

(e) 3 Atk. 567. 2 Madd.

Ch. 198.

(f) 1 Ves. 383. 3 Madd.
434. Ant. 109.(g) Prac. Reg. Wy. Ed. 37.
Cary 55.

by herself (*a*), the Irregularity would be waived by obtaining an Order for Time to answer (*b*). An *Infant* Defendant must enter an Appearance, and a Guardian *ad litem* be appointed to defend the Suit; if the Infant resides within twenty Miles of London the Guardian is appointed by the Court or the Master of the Rolls; beyond that Distance the Appointment is made by Commission: in a Town Cause, a Guardian may be appointed any Day in Term or Vacation, for which Purpose, Instructions must be given to the Infant's Clerk in Court, and he will attend with the Infant of the proposed Guardian, either in Court or at the Rolls; the Clerk in Court previously prepares a Note in Writing, with the Title of the Cause, the Name of the Infant and of the intended Guardian; this Note he gives to the attending Registrar, who informs the Court or the Master of the Rolls, (if the Application be at the Rolls) and the Infant and the Guardian being personally in attendance, if the proposed Guardian appears to be a proper Person and not interested in the Matters in question, the Appointment is made as of course; the Order must be drawn up at the Register Office, passed and entered and served upon the adverse Clerk in Court, like other Orders of course: the Appointment of a Guardian by commission will be found under Title "Answer." If the Infant neglects or refuses to appear, the Plaintiff issues an Attachment. and thereon obtains an Order as of course for a Messenger, and under the usual Warrant he brings the Infant into Court, and if no proper Person offer to be Guardian, the Court usually assigns the senior Six-Clerk the Cause Guardian to the Infant to answer and defend the Suit.

The Defendant's Appearance to a Bill or Information is entered by a Clerk in Court, from Instructions given by the Defendant's Solicitor, usually in the following form:

(*a*) 2 Vern. 613. Prec. Ch. 328. (*b*) 1 Ves. 383.

Mr. Bicknell,

Enter an Appearance for *John Doe and Wife*,
at the Suit of *Richard Roe*.

24th June, 1824.

Duncombe, Solicitor.

In this early Stage of the Suit, it may be useful to observe, that if the Bill be not on the File by the Return of the Subpœna, the Defendant is entitled to Costs (*a*): by a legislative Enactment (*b*), no Subpœna shall issue until after the Bill is filed, except Bills for Injunction to stay Waste, or Proceedings at Law commenced; and by the Standing Orders of the Court, no Bill is to be ante-dated (*c*): If after Service of the Subpœna, the Defendant's Clerk in Court finds that the Bill has not been filed or entered, and the Bill be not within the Exceptions of the Statute, or if it be an Injunction Bill within the excepted Cases, and not filed on or before the Return-Day of the Subpœna, the Defendant is not obliged to appear, or he may prefer Costs, and this he may do at any Period of the Term in which the Subpœna is returnable, and before the second Seal following; for this Purpose he must give Instructions to his Clerk in Court, who after taking the usual Precautions to prevent the Bill being ante-dated, prefers Costs by making an Entry in the House-Book of the Chancery Office, and leaving the usual Note with his Six-Clerk, a Bill of Costs is then made out (*d*), which the Master at the Public Office taxes and certifies by his Initials, the Bill and Allocatur is afterwards entered at the Register Office, paying a Fee of one Shilling and four Pence, and a Subpœna for recovery of these Costs may be obtained by leaving a Præcipe and producing the Bill and Allocatur at the Subpœna Office, and the usual Proceedings taken for enforcing Payment, and the Plaintiff will not be allowed to file his

(*a*) Toth. 47. Carey, 46.
Beam. Costs. 218.

(*b*) 4 and 5 Ann. c. 16.

(*c*) Ord. Canc. Be. Ed. 168.

(*d*) Infr. 510.

Bill until the Costs are paid, unless by consent; but he may obtain an Order to file it *nunc pro tunc*, by Motion or by Petition to the Master of the Rolls, as of course, and in some Cases upon Payment only of Costs out of Purse.

If a Plaintiff, who is neither a Sea or Land Officer, or a Consul (*a*), be out of the Jurisdiction, and resident or *settled Abroad*, out of the Reach of the Process of the Court (*b*); or if he appears to be so on the Face of the Bill (*c*); and there are no Co-Plaintiffs within the Jurisdiction (*d*); the Defendant after he has entered an Appearance may oblige the Plaintiff to give *Security for the Costs of Suit, and stay the Proceedings till Security be given* (*e*); but it is incumbent on the Defendant to make the Application the first Moment he is aware of the Fact, if afterwards he takes any Step in the Cause he will be held to have waived his Right to such Security (*f*); an Order for Time to answer has been held to waive the Defendant's Right, and Security for Costs has been refused (*g*); so after Answer, though insufficient and filed by mistake, the Application has been held too late (*h*); but not if Plaintiff goes away to settle Abroad after Answer filed (*i*); or his Residence Abroad be not discovered till after Publication (*k*). The Course of Proceeding to carry into effect an Order directing Security to be given will be found in a subsequent Part of this Work.

The Defendant's Solicitor having entered an Appearance, and obtained from his Clerk in Court an Office Copy of the Bill, would act prudently in submitting it to the Perusal

(*a*) Dick. 154. 3 Moore, 77.

(*b*) 2 Bro. C. C. 609. 3 Bro. C. C. 371. 1 Ves. j. 396. 2 Cox, 284. 2 Hull. Costs, 441. 5 Madd. 87.

(*c*) 2 Ves. 24. 6 Madd. 46.

(*d*) 6 Ves. 612. Dick. 282. 775.

(*e*) 10 Ves. 287.

(*f*) 2 Ves. 24. Dick. 147.

(*g*) 10 Ves. 287.

(*h*) 2 Bro. C. C. 609. 15 Ves. 2. 1 Madd. Rep. 187.

(*i*) 14 Ves. 518.

(*k*) Dick. 799.

and Advice of Counsel; if the Bill states any thing *scandalous* or *criminal*, upon Application to the Court it will be expunged as of course: Matter not *relevant* to the Plaintiff's Case will be deemed *impertinent*, and as such struck out (*a*); but nothing relevant is deemed scandalous (*b*): it is not the Nature of the Matter which makes it scandalous, for if it be relevant to the Case made by the Bill, of whatever Nature it may be, it is not scandalous; the Degree of Relevancy is not considered, especially if it has an Influence on the Decision (*c*); long Recitals, or unnecessary Digressions, or Deeds set out at large, not required to be so by the Bill, have been considered impertinent; but the Bill may be impertinent and not scandalous, though if it be scandalous, it has been decided to be impertinent (*d*). It should not escape the Attention of the Junior Practiser, that an Objection to the Purity of the Pleadings in regard to Impertinence must be taken in the first Stage of the Cause; a Reference for Impertinence after Answer (*e*), or an Order for Time to answer (*f*), has been held too late: a Defendant not served with Process has been allowed to appear gratis, and refer a Bill for Impertinence (*g*); Scandal may be complained of at any Time (*h*): but an Application by a Person not party has been rejected upon the Decision of Lord Eldon, that a Stranger to the Record has no Right to take an Office Copy of the Bill, without which he cannot proceed before the Master; if he is libelled by the Record, he must proceed at Law (*i*), as on any other Writing (*k*): for any Matter in the Bill, as to which the Court has Jurisdiction, no Action at Law

(*a*) Ord. Canc. Be. Ed. 167.

(*f*) 2 Ves. 631. 5 Ves. 656.

(*b*) Red. Tr. Ch. 39. 2 Ves. Dick. 173.

24. 6 Ves. 514.

(*g*) 2 Bro. C. C. 279.

(*c*) 11 Ves. 526.

(*h*) 1 Ves. 24.

(*d*) Ibid.

(*i*) Crok. Eliz. 230.

(*e*) 2 P. Wms. 313.

(*k*) 4 Madd. 252.

will lie though false, it being in a Court of Justice (a). The Course of Proceeding upon References of Pleadings for Scandal and Impertinence will be found under the respective Heads.

The Defendant in a Town Cause is allowed eight Days after his Appearance exclusively to put in an Answer; in a Country Cause he has until the first Day of the next Term after his Appearance to sue out a Commissioner for taking his Answer. At the Expiration of this Period, if no Demurrer, Plea, or Answer is filed, the Plaintiff's Clerk in Court must give a Note in Writing to the Defendant's Clerk in Court, signifying that an Attachment for want of Answer will immediately issue; to prevent which, if the Defendant's Solicitor is not prepared to put in the Answer, he must apply for an Order for Time, which he may obtain on Motion as of course any Day in Term at the Rising of the Court, or at the Seals after; or at the Rolls on those Days when his Honour sits to hear Causes; but it may be more expeditiously obtained by Petition to the Master of the Rolls. The Defendant is entitled to three Orders for Time to put in his Answer as of course. But on the third Application for Time to answer, he must consent to enter his Appearance with the Register by his Clerk in Court in four Days, consenting that the Serjeant at Arms shall go against him as on a Commission of Rebellion returned *non est inventus*, in case he doth not put in his Answer by the Time granted (b); but in most Cases it is more advisable to let an Attachment issue for want of Answer, than to accede to the Severity of a third Order. And on a second Application for Time to answer an amended Bill, or after Exceptions allowed, the Defendant is to consent to the same Terms. But this Order is not to preclude an Application to the Court for further Time, under special Circumstances. The Length of Time allowed in a Town Cause is a Month by the first

(a) 4 Co. 146. (b) Ord. Canc. Be. Ed.

Order, three Weeks by the second, and a Fortnight by the third. In a Country Cause, six Weeks by the first, a Month by the second, and three Weeks by the third. To obtain the first Order for Time, a Petition must be presented to the Master of the Rolls (for which see Title "Petitions,") and left at the Secretary's Office in the Rolls Yard, or a Motion Paper given to Counsel in the following Form :

" LAWRENCE	}	Brief.
against		
" WILSON, and another.		

" To move that the Defendants Wilson and Johnson
 " may have a Month's Time to plead, answer, or
 " demur, not demurring alone. First Application,
 " and not in Contempt."

" Mr. Maddock $\frac{1}{2}$ Gui."

At the Bottom the Name of the Solicitor is subscribed, and on some Part of the Motion Paper (usually on the Inside) the Title of the Cause, with the Christian and Surname of the first Plaintiff, and the like of all the Defendants for whom the Application is made, that the Register may draw up the Order without waiting for further Instructions. The Order will be made of course, and the Counsel will sign his Name to the Motion Paper, which must be left with the Register to draw up the Order, on leaving the usual Fee. When the Order is drawn up, Care should be taken that it is free from Mistake, and the Register, or the Clerk at his Seat, will then pass it, by setting the Initials of the Register's Name on the left Margin at the Bottom of the Order. A Copy of the Order must be made on plain Paper bookwise, and left with the proper Entering Clerk, who will mark the Original Order 'Entered,' and will afterwards enter it in the Office Books from the Copy. Another Copy of the Order must be

served on the Plaintiff's Clerk in Court, at his Seat in the Six Clerks' Office, or on his Copying Clerk there, shewing at the same time the original Order passed and entered: it should be remembered that the Order is no Stay of an Attachment until it is served (a).

When the Defendant resides in the Country, his Answer is usually taken by commission; the Course of Proceeding to take and return an Answer of a Defendant above twenty Miles from London, will be found in another Part of this Work.

HILARY VACATION.

If the Answer be not ready at the Expiration of the Time granted by the first Order, another Order must be obtained, which in the Vacation after the Seals can only be applied for by Petition to the Master of the Rolls. This Order, being the second, is styled a peremptory Order; but a third Order, giving a Fortnight's further Time, will be granted, on the Defendant's consenting to enter his Appearance with the Register.

The Petition for further Time, being fairly engrossed on Paper, must be left at the Secretary's Office at the Rolls. When answered, 5s. 6d. must be paid. The Petition answered, must be left with the proper Officer (Mr. Bird) at the Register's Office, together with the former Order. He will draw up and pass the Order for further Time, which must be entered and served in the Manner before directed.

EASTER TERM, 1820.

On the Expiration of the second Order, if the Answer is not prepared, Application must be made for a third, either by Motion or Petition; if by Motion, it should be stated in the Instructions that two Orders only have been had; the third will then be granted, on the Terms of the Defendant entering his Appearance with the Register in

(a) 19 Ves. 380.

four Days, consenting that a Serjeant at Arms shall go against him as on a Commission of Rebellion returned *non est inventus*, in case he does not put in his Answer by the Time then granted. The Motion Paper, with the second Order for Time, must be left with the Register, and he will draw up the Order, which must be passed and entered, and the Defendant, by his Clerk in Court, must within four Days after the Date of the Order enter the Defendant's Appearance pursuant to the Standing Orders of the Court (a); this is done by the Defendant's Solicitor delivering the Order to the Defendant's Clerk in Court, and the latter applying to the proper Entering Register, and producing to him the Order, the Register makes an Entry upon Stamped Paper of the Defendant's Appearance, to which is subjoined a Consent that the Serjeant at Arms shall go against the Defendant as directed by the Order, which the Clerk in Court subscribes on the part of the Defendant. A Certificate of the Appearance being entered, is written on the Order, dated and signed by the Entering Register, and a Copy of the Order and Certificate must be served upon the Plaintiffs Clerk in Court in the usual course.

After the third Order, if the Defendant should require further Time, putting in a short evasive Answer, without assigning a sufficient Reason for not putting in a better, Lord Eldon has considered as no Answer, but a mere Delusion, and in the first Instance has made an Order of Reference to see if it was *substantially an Answer*, and that it should be understood as the Practice in future to take it off the File (b): but it has been recently decided that until a general Order of Court is made, such an Answer must be disposed of by taking Exceptions (c). To obtain an Extension of the Time to answer, a special Application must be made by Motion, or Petition to the Court, or to

(a) Ord. Canc. Bc. Ed. 455. Mitford, Michas. 1813. MSS.

(b) 14 Ves. 415, overruling 2 Madd. Ch. 343.
9 Ves. 178, 463. Myers v. (c) 3 Madd. 437.

the Master of the Rolls, supported by an Affidavit of the special Circumstances upon which the Application is grounded: in a Case not of general Practice, but of Circumstances raising an Exception, a special Order for Time to answer has been made without the usual Order for Time having been previously obtained (*a*); but it should seem that an Application for Time to answer on *special* ground, if in its Nature such as the Defendant can be apprised of in Time, should be made in the first Instance, before an Application for the usual Orders (*b*); Lord Eldon held bodily Infirmary an Exception to the general Rule, and the extreme Length of the Bill seems to have been a strong auxiliary Circumstance (*c*); in a Case of doubtful Practice, further Time has been allowed on Terms (*d*); after a third Order for Time, a Defendant coming within the Restrictions of the general Order of 1794, and putting in an Answer, to which Exceptions have been filed and submitted to, has been held not entitled to further Time to answer the Exceptions (*e*); after two Answers reported insufficient, the Defendant is not entitled to six Weeks Time to answer, and an Order so obtained has been discharged with Costs (*f*); where only *one* Order for Time has been obtained, and Exceptions have been taken to the Answer, and allowed, not having previously come under the Terms of the general Order of Court, the Defendant is entitled to one Order for Time, and will not be put under those Terms until a second Application for Time to answer the Exceptions (*g*); if upon the coming in of a Plea the Plaintiff amends his Bill, upon payment of Costs, the Defendant is entitled to the same Orders for Time to answer as upon an Original Bill (*h*): *Peers of the Realm, and of Parliament*, though not mentioned in the general Order, are held within

(*a*) 12 Ves. 66.

(*b*) 19 Ves. 112.

(*c*) Ibid.

(*d*) 1 Ves. and Bea. 324.

(*e*) 8 Ves. 601.

(*f*) 6 Ves. 144.

(*g*) 17 Ves. 114.

(*h*) 9 Ves. 231.

its provisions; a Peer Defendant, upon a third Order for Time, undertakes that if his Answer be not put in, a Sequestration shall go; and if he puts in an insufficient Answer, a Sequestration absolute will be ordered in the first Instance (a); where an Attorney had instituted a Suit against himself as Executor, and to prevent the Money in his hands being paid in, had lain by for ten Years without putting in an Answer, he was ordered to put in an Answer in a Week, or to stand committed, and was held not entitled to the usual Orders for Time to answer (b); the Plaintiff in a Cross Bill being in contempt for want of Answer to the Original Bill, cannot compel the Defendant in the Cross-Bill to put in an Answer to the latter Bill until he (Defendant in the Original Bill) has answered the Original Bill (c): And if he obtains an Order for a Month's Time after Answer to the Cross-Bill to put in an Answer to the Original Bill after the Cross-Bill has been answered, and the Month has been suffered to run out without answering, he is not entitled *as of course* to any further Time to answer (d); but if the Plaintiff in the Original Bill amends in a material point after the Cross-Bill has been filed, he loses his Priority of Suit, and must put in an Answer to the Cross-Bill before he can compel an Answer to the amended Bill (e); an Answer to the latter cannot be compelled *by Process* until the Amendments have been entered in the Six Clerk's Book (f); where the Bill required an Answer to Facts, upon the Inspection of Documents in Plaintiff's possession, not left with Plaintiff's Clerk in Court till twenty-two Days after an Order for Time to answer had been obtained, the Defendant was allowed as much Time in addition to the Order, and without prejudice to the usual Order, upon a second

(a) 8 Ves. 87, 603.

(d) 3 Madd. 183.

(b) 3 Ves. and Be. 92.

(e) 2 P. Wms. 435. 2 Atk.

(c) 1 P. Wms. 266. 1 218. 3 Atk. 723.

Swaust. 124.

(f) 1 Sim. and Stu. 118.

Application, after the additional Time had expired (*a*); in a recent Instance, where a Bill against Executors claimed payment of two Promissory Notes of similar dates and value, upon Affidavit of one of the Executors, that on inspecting the first Note he observed on the Face of it Circumstances tending to impeach its authenticity, and that the second Note had been produced for payment abroad, that he was advised and believed that previous to putting in an Answer fully to meet the Case, it was necessary that he should previously inspect the second Note, Lord Eldon enlarged the Time for answering till a Fortnight after the Production of the second Note (*b*).

It remains to observe, that the first Order for Time to answer ought to be obtained and served before the eight Days for answering have expired, and every subsequent Order for further Time, before the Expiration of the Order preceding; a severe Practicer might insist that any Interval not covered by an Order would entitle him to an Attachment; but previous to issuing that Process for want of Answer, by the Practice (*c*) of the Six Clerks' Office, the adverse Clerks in Court must give two Days Notice in Writing to each other before they issue an Attachment for want of Answer; an Attachment issued without such Notice has been set aside for Irregularity with Costs (*d*): in very adverse Proceedings, where a Petition for Time has been left with the Secretary, (which Lord Eldon has decided the Defendant has a Right to have answered on the very Day it is presented (*e*),) but not in Time to draw up and serve the Order, so as to prevent an Attachment, the Vice Chancellor seems to have held that Service of *a*

(*a*) 2 Meri. 142.

(*c*) 1 Ves. and Bea. 317. 1

(*b*) 1 Swanst. 114, 580. 1

Madd. Rep. 550.

Wils. C. C. 113. Pra. Reg.
Wy. Ed. 161.

(*d*) Anon. Trin. 1802. Hand.
Chan. 33. Order cited.

(*e*) 3 Meri. 15.

Copy of the Petition, with his Honour's Answer thereon, upon the Plaintiff's Clerk in Court, and the Order afterwards drawn up and served with all convenient Dispatch, would prevent an Attachment (a): an Order for Time to answer, obtained on the same Day that an Attachment was issued, has been discharged as irregular, the Attachment being considered as sealed the first Moment of the Day on which it issues, and the Attachment has been decided to have precedence (b): or if the Answer is sworn and left at the Public Office, to prevent an Attachment, it must be actually on the File the Evening at latest before the Day on which the Application is made (c). Service of an Order for Time, without producing the Original Order at the Time of Service, has been held irregular, and not sufficient to prevent an Attachment issuing for want of Answer (d): and it should be further observed, that if a Defendant is in Contempt for want of Appearance or Answer, and afterwards enters his Appearance, or files his Answer, and then tenders the Costs of Contempt to the Plaintiff's Clerk in Court, and those Costs are refused, to clear his Contempt, he must obtain an Order by Motion or Petition as of course upon the Six Clerk's Certificate of his Appearance being entered, or his Answer filed, and upon payment or tender of the Costs of Contempt, verified by Affidavit: it has been decided, that he continues in Contempt until discharged therefrom by Order, previous to which being obtained, an Application to dismiss for want of Prosecution has been held irregular and refused (e).

The Grounds on which Defence may be made to a Bill, and the Forms of making it, vary according to the Foundation on which it is made, and the Extent to which it submits to the Judgment of the Court. The Modes of De-

(a) 3 Madd. 246. 2 Meri. 474. .

(b) 1 Madd. Rep. 551.

(c) 2 Meri. 474.

(d) Coop. 282. 19 Ves. 380.

(e) 1 Sim. and Stu. 121. 1 Ves. and Bea. 331.

Defence may be by *Demurrer*, *Plea*, *Answer*, or *Disclaimer*; all or any of which may be used together, if applying to *separate and distinct* Parts of the Bill (a): it would greatly exceed the Limits of this Work to enter at large into the various Modes of Defence to Suits in Equity; it may be sufficient for the present Purpose to confine our Observations to the Defence by *Answer*, as that usually resorted to in Suits against Personal Representatives for the Distribution of Assets. In a former Part, having incidentally treated of the chief Requisites of an Answer (b), it may be sufficient to observe, that whatever Part of a Bill or Information is not covered by Demurrer, Plea, or Disclaimer, must be defended by Answer (c); if a Plea be overruled, the Defendant may insist on the same Matter by way of Answer (d); but this seems to apply to a Bill for Relief; after a Plea to a Bill for Discovery is overruled, the Defendant cannot by Answer insist on the same Matter (e). An Answer *prima facie*, is an Admission that the Defendant cannot plead (f). For the Purpose of ascertaining Facts material to the Merits, as well to enable the Plaintiff to obtain a Decree, as to substantiate the Proceedings and make them effectual, every Plaintiff is entitled to a Discovery from the Defendant (g) of the Matters charged in the Bill; and this may be either from defect of Proof, or in aid of Proof, and to avoid Expence: if, says Lord Redesdale, the Defence to a Bill consists of a Variety of Circumstances, not proper to be offered in the Shape of a Plea (h), or if it be doubtful whether as a Plea it will hold, the Defendant may set forth the whole by way of Answer, and pray the same Benefit of so much as goes in bar as if it had been pleaded (i), or if the Defendant can offer by Plea a complete Bar, and has

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| (a) Red. Tr. Ch. 12, 85. | (e) 1 Cox 224. |
| (b) Ant. 139. | (f) 15 Ves. 378. |
| (c) Red. Tr. Ch. 248. | (g) 2 Atk. 241. 2 Ves. 492. |
| (d) 2 Ves. 492. 1 Atk. | (h) 1 Atk. 54. |
| 450. 3 P. Wms. 95. | (i) 2 P. Wms. 145. |

no Occasion to protect himself from any Discovery sought by the Bill, but can shew Circumstances favourable to his Defence, which he could not offer together with a Plea, he may set forth the whole Matter in the same Manner: in the Instance of a Purchaser, for valuable Consideration clear of Fraud or Notice, expending large Sums in Improvements, with the Plaintiff's Knowledge, which he cannot set forth by Plea, or by Answer in Support, it would be prudent to set forth the Whole by Answer, rather than to rely on a single Defence by Plea, unless it be material to prevent Disclosure affecting the Title. A Defence, which if insisted on by Plea, would protect the Defendant from a Discovery, will not in general do so, if offered by Way of Answer (a): but it may be proper to remark, that an Answer in support of a Plea, must be full and clear, or it will not be effectual to support the Plea; if it is in Substance an Answer, it has been held sufficient (b); if Fraud, or Notice, or some Equitable Ground, is not charged, the Plea alone is sufficient. As an Answer is to be looked upon as more or less deserving of Credit, according as it more or less fairly meets all the Enquiries contained in the Bill (c), to all necessary and material Charges, the Defendant must Answer direct and without Evasion. By the Orders of Court, if the Fact be laid to be done with divers Circumstances, the Defendant must not deny or traverse it literally, as it is laid in the Bill, but must answer the Point of Substance positively and certainly; and if he deny the Fact, he must traverse or deny it (as the Cause requires) directly, and not by Way of Negative Pregnant, or as the noble Author has laid it down, he must confess or traverse the Substance of each Charge (d): there must be an Answer to the sifting Enquiries upon the general Subject (e).

(a) 2 Eq. Ca. Abr. 67. Red.
Tr. Ch. 250.

(c) 3 Meri. 41.

(d) Ord. Can. Be. Ed. 179.

(b) 3 Atk. 304. 3 P. Wms. 6 Ves. 792. Cowell ad voc.
145. 3 Bro. P. C. 373. 6
Ves. 596.

(e) Coop. Pl. 313.

An Answer to a Matter charged as Defendant's own Act, must regularly be without saying, to his Remembrance, or as he believeth, if it be laid to be done within seven Years before, unless upon Exception, the Court shall dispense with so positive an Answer (*a*). Particular and precise Charges must be answered particularly and precisely, and not in a general Manner, though a general Denial may amount to a full Denial of the Charges (*b*); as where a general Account was required, and also specific Sums with the incidental Circumstances of Dates, to whom paid and for what Purpose received, a general Account by Schedule was upon Exceptions held insufficient (*c*); but to Facts not within Defendant's own Knowledge, he must answer as to his Information and Belief, and not to his Information merely, without stating any belief either one Way or the other; and to recent Facts within his own Knowledge, he must answer positively, though not so as to the Result of a Conversation (*d*). Combination expressly charged, must be directly answered; a general Denial will not be sufficient: an Answer must state Facts, and not Argument, but there must be a positive Averment (*e*); to Facts interrogated, but not stated or charged, no Answer can be required (*f*); but under a general Charge, as for Instance to the Fact of Payment, all material Questions to shew the Payment may be charged, and must be answered (*g*); and so if Defendant be charged with the Receipt of Money, he must deny or Traverse, that he has not received that Sum, or any Part of it, or he must set forth what Part he hath received (*h*): where a Defendant has answered all the Circumstances of his own Case, he is not to answer the further Circumstances of the Bill, but if he only answers Part of

(*a*) Ord. Canc. Be. Ed. 29.
179.

(*b*) Red. Tr. Ch. 250. 2
Eq. Ca. Abr. 67. Sel. Ca. Ch.
51.

(*c*) 1 Bro. C. C. 503.

(*d*) Coop. Pl. 314.

(*e*) 11 Ves. 290, 303.

(*f*) 1 Atk. 53. 1 Ves. 538.

(*g*) 11 Ves. 301. 8 Ves. 193.

(*h*) Ord. Canc. Be. Ed. 179.

Coop. 314.

them, or states Part of a Conversation, he must state the Whole (*a*); a Defendant submitting to answer particular Facts cannot stop short, and refuse to give any further Answer as to the Circumstances attending those Facts, but he is not to confine himself to the Interrogatories and Charges of the Bill, he may state Circumstances in his Defence, guarding against immaterial Statements and avoiding Impertinence (*b*). The general Rule is, that if a Defendant answers, he must answer fully (*c*), except the Discovery tends to criminate (*d*), or to affect him as a Purchaser for valuable Consideration without Notice (*e*); if to forestall the Testimony of a Witness, he is made a Defendant, and he neglects to protect himself by Demurrer or Plea (*f*), he must put in a full Answer to the Discovery sought, with the Exceptions before-mentioned.

Where the Answer denies the Plaintiff's Title, in some Cases, Defendant must give the Discovery prayed, although not material to the Plaintiff's Title, who if he has no Title, can have no Benefit from the Discovery (*g*); in a Creditor's Suit, the Executor must admit Assets, or set forth an Account, although he denies the Debt (*h*); but where a Defendant sets up a Title in himself apparently good, and which the Plaintiff must remove to found his own Title, the Defendant is not generally compelled to make any Discovery not material to the Trial of the Question of Title (*i*). If a Discovery is in any degree connected with the Title, it should seem that a Defendant cannot protect himself by Answer from making the Discovery; where an Account wholly independent of

(*a*) 2 Bro. C. C. 222. 2 Swanst. 192, 305. 2 Swanst. 214.

(*b*) 11 Ves. 283. 2 Madd. Ch. 355. (*e*) 2 Ves. j. 454. 15 Ves. 378. 1 Ball. and Be. 325.

(*c*) 2 Bro. C. C. 252, 332. 3 Madd. 72. 4 Madd. 252. 1 Sim. and Stu. 6. (*f*) 2 Bro. C. C. 252. 3 Madd. 70.

(*g*) Red. Tr. Ch. 251.

(*d*) 10 Ves. 228, 450. 1 (*h*) Hardr. 132. Ambl. 354.

(*i*) Ambl. 335. 11 Ves. 291.

the Title is required, the Court has declined laying down any general Rule, deciding ordinarily upon the Circumstances of each particular Case (*a*); a Plea has been ordered to stand for an Answer, with liberty to except to it as an insufficient Answer, and the Power of excepting has in some Cases been limited, so as to protect the Defendant from setting forth Accounts not material to the Plaintiff's Title, where that has been doubtful (*b*); it should seem that if an Allegation is made by a Defendant of a Fact destroying the Plaintiff's Title, whether it be by Plea or Answer is immaterial, it will protect the Defendant from the Discovery, upon the Principle, that if the Defendant denies some Substantive leading Fact, which if admitted, would intitle the Plaintiff to relief, until the Truth of the Fact is disposed of, no further Answer shall be compelled, but if the Defendant does not deny some leading Fact, a full Answer must be given (*c*). If Fraud be charged by the Bill, it must be denied by Answer, and not by way of Plea (*d*); and where Circumstances are alledged, which in legal Construction amount to a Fraud, the Ground of Fraud is sufficiently laid, although that Term be not applied in the Bill to such Circumstances (*e*). Where a Defendant insists that he is a Purchaser for valuable Consideration, Notice may be denied by Plea or Answer (*f*). *Deeds, Writings, or Records* ought not to be set forth in *hæc verba*, but the Effect and Substance only with a *profert*, if so prayed by the Bill: if Defendant says he is ready to let Plaintiff have Copies, or if he sets forth only that Part to which the Enquiry tends, it has been held sufficient (*g*). A Writer of high Character,

(*a*) Red. Tr. Ch. 253.

(*f*) Mos. 73.

(*b*) 3 Bro. C. C. 305.

(*g*) Ord. Cano. Be. Ed. 70,

(*c*) 3 Ves. 446. 4 Ves. 107.
11 Ves. 283, 291, 303. Ambl.
354.

166. 1 Ves. 207. 1 Meri.
347, 357. Cliffield v. Powell,
24. Feb. 1818. 2 Madd. Ch.
355. MSS.

(*d*) 1 Vern. 185.

(*e*) 5 Dow. 389, 409.

observes, that if an Instrument is required to be set forth by the Bill, it is not impertinent to set forth the Whole, for if Defendant takes upon himself to state the substantial Part only, and an Exception is taken, the Court would be unable to decide what was the substantial Part.

Admissions in Answers should be strictly guarded; a general Admission of Assets will intitle the Plaintiff to a personal Decree against the Executor (*a*); the Admission of Assets by one Executor does not prevent the Plaintiff from proceeding against the other (*b*); but the Plaintiff going on to an Account of Assets, and praying a Receiver, has been held to be a Waiver of the Admission (*c*). An Executor has been allowed to qualify a general Admission in his Answer by Amendment, charging Himself with a specific Sum (*d*); but more usually by a Supplemental Answer (*e*); the Admission in an Executor's Answer of a specific Sum received, if coupled with the Application, the Whole will be taken together; but if the Admission stands separate and distinct, there not being that Connexion which the Rule requires, Items in the Answer separate and unconnected, cannot be allowed in discharge of the Sum so admitted due, being Evidence in contradiction to the general Rule of not allowing a Defendant to contradict his own Answer, he must from his Accounts bring in his Discharge, and support it by Proof *aliunde* (*f*).

If the Answer goes out of the Bill, to state Matter not material to the Plaintiff's Case, it will be deemed *impertinent*, and upon Application to the Court will be expunged; and so if any thing *scandalous* is inserted, the Scandal will be expunged; but in an Answer as in a Bill, nothing rele-

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| (a) 1 Bro. C. C. 488. 2 Bro. C. C. 619. 1 Ves. 85. 4 Ves. 606. | (d) 9 Ves. 365. 10 Ves. 284. Dick. 35. |
| (b) 2 P. Wms. 145. | (e) 6 Ves. 556. 1 Ves. & Bea. 158. |
| (c) 1 Bro. C. C. 484. | (f) 7 Ves. 404, 487. 19 Ves. 584. |

vant will be deemed scandalous. If the Plaintiff conceives an Answer to be *insufficient* to the Charges in the Bill, he must take Exceptions, stating such Parts as he is advised are not answered.

An Answer begins with the Title, specifying such of the Defendants of whom it is the Answer, with the Names of the Plaintiffs in the Cause in which it is filed; after the Title, it reserves all Advantage which may be taken by Exception to the Bill, a Form which has been continued for a Purpose which is now of no use: the Answer to the several Charges of the Bill, with such additional Matter as may be necessary, either to qualify or add to the Case made by the Bill, or to state a new Case in his own behalf, next follows, concluding with a general Traverse or Denial of the Combination charged, which, though unnecessary, is continued in Practice (*a*). The Answer of an Infant being made by Guardian, the general Saving at the Beginning, with the Denial of Combination, and the Traverse at the Conclusion are omitted (*b*); his Answer cannot be excepted to for Insufficiency (*c*), nor will an Admission by him be binding (*d*).

A Further Answer is in every Respect similar to, and is considered as forming Part of the first Answer (*e*); and if the Defendant in his former Answer, insisted upon any Matter as a Ground for not answering, he is not precluded from insisting on the same Matter in his further Answer, and taking the Opinion of the Court, by Exceptions to the Report upon a Reference (*f*). The Course of Practice of filing a further Answer, will be found under the *Title Exceptions*.

An Answer to an amended Bill is considered as constituting Part of the Answer to the original Bill, which, with the

(*a*) 2 P. Wms. 87.

(*b*) Red. Tr. Ch. 254.

(*c*) 4 Bro. C. C. 256.

(*d*) Dick. 545.

(*e*) 3 Atk. 303. Red. Tr.

Ch. 256.

(*f*) 2 Ves 291.

amended Bill, form but one Record (a); if the Defendant in his further Answer, or in his Answer to the amended Bill, repeat anything comprised in the former Answer, the Repetition unless it vary the Defence in Substance, or is otherwise necessary or expedient, will be considered as impertinent, and upon Reference expunged. If the Amendments are grounded upon Exceptions to the Answer submitted to or allowed, Service of the Order to Amend upon the Defendant's Clerk in Court will be compulsory upon the Defendant; and so where an Answer is reported insufficient, and no Exceptions are taken to the Report, Service of the Subpœna to make a better Answer upon the Clerk in Court, will be regular: but upon an Answer reported insufficient, and an Order to amend and to answer the Exceptions, if an active Practiser puts in an Answer to the Exceptions before the Order is served, the further Answer to the Exceptions will be regular and defeat the Order (b): an Answer to an amended Bill is prepared and filed with the same Formalities as an Answer to an original Bill. Under the Order of Court of *January*, 1794, on a second Application for Time to Answer an amended Bill, the Defendant is to consent to the Terms of that Order; but where the Plaintiff amended his Bill *upon payment of Costs*, the amended Bill was held not to be within the Provisions of the Order, and the Defendant was intitled to the same Time to answer, as upon an original Bill (c); and although an Order to amend suggests that no further Answer is required, yet the Defendant is at liberty to put in an Answer to the Amendments, and the Plaintiff cannot in strictness reply to the Answer until eight Days after the Record of the Bill and the Defendant's Office Copy is amended and delivered over to the Defendant's Clerk in Court; for it does not follow, that because the Plaintiff requires no Answer, that the Defendant is to put in none; under Colour of amending, Matter may be introduced destructive to the Defendant if submitted to

(a) 3 Atk. 303.

(b) 9 Ves. 231.

(c) 1 Ves. j. 86. 11 Ves. 578. 2 Cox. 392. Dick. 296.

A Disclaimer is where a Defendant renounces all Right and Title to the Matter in demand by the Plaintiff's Bill (a); it is distinct in Substance from an Answer, though sometimes confounded with it, and put in upon the Oath of the Defendant, but it cannot often be put in without an Answer; for if Defendant has been made a Party by mistake, having had an Interest, which he may have parted with, the Plaintiff may require an Answer sufficient to ascertain whether that is the Fact or not, and if in Truth it is so, an Answer seems necessary to enable the Plaintiff to make the proper Party instead of the Defendant disclaiming; although a mere Witness may avoid answering by Disclaimer, yet an Agent charged by a Bill with personal Fraud, cannot by disclaiming Interest, avoid answering fully (b): if a Defendant puts in a Disclaimer, and afterwards discovers that he had an Interest which he was not apprized of at the Time he disclaimed, the Court will upon the Ground of Ignorance or Mistake, permit him to make his Claim; and although he may not be absolutely estopped by his Disclaimer, he cannot get rid of a Disclaimer, without a strong Case, upon Affidavit (c); and if the Disclaimer and Answer are inconsistent, it will be taken strongly against the Disclaimer, but the Answer may be to one Part of the Bill, and the Disclaimer to another Part: where the Defendant Disclaims, the Court will in general dismiss the Bill against him, unless his Conduct has been vexatious (d); but it is laid down in a Book of considerable Authority in the original Text, that if the Plaintiff shows a probable Cause for exhibiting the Bill, he may by Motion or Petition, pray a Decree against the Defendant, and all claiming under him, upon the Ground of Disclaimer without Costs on either Side (e); where the Defendant Disclaims, unless the Disclaimer be only as to *Part*, and an Answer to the rest of the Bill, the

(a) Prac. Reg. Wy. Ed. 175.

(d) Red. Tr. Ch. 257.

(b) 1 Anstr. 47.

(e) Prac. Reg. Wy. Ed. 41.

(c) 1 Ves. 267.

Red. Tr. Ch. 257.

Plaintiff should not reply, if he does, he pays the Costs (a); it should seem that a Defendant, who disclaims may be examined as a Witness for a co-Defendant (b); but not for the Plaintiff to the Prejudice of a Defendant (c): a Disclaimer partakes in most respects of the Formal Parts of an Answer, the Words of course preceding and concluding an Answer being used in a Disclaimer, and the Forms given in the Books of Practice are all of an Answer and Disclaimer (d).

Having discussed the Matter and Nature of an Answer, we may proceed to state, that the Solicitor when he has read over the Bill, and obtained from the Defendant Instructions to prepare his Answer; in Cases of ordinary Occurrence, the Solicitor may take upon himself to prepare the Draft of the Answer; but as the Draft must be signed by Counsel (e), it is usual, and much more advisable, to lay the Bill and Instructions for Answer before Counsel, and to let him prepare and sign a Draft of the Answer. The Answer requiring the Sanction of an Oath, the Draft should be very seriously and attentively perused by the Defendant, and when approved by him, fairly transcribed upon Parchment with a 5s. Stamp on each Skin, in Words at length, and not in Figures, except Schedules of Accounts: as much may be comprised in each Skin as it will contain, so that it be fairly legible, and the Counsel's name subscribed at the Foot. The Transcript must be very carefully examined with the Draft, and very correctly read over by the Defendant, after which he must sign his Christian and Surname, in Words at length, which, (by an Order of the Court (f), not now attended to) he ought to sign in the Presence of the Master, before whom it is sworn. In a Town-Cause, the Answer is sworn before the Master at the Public-Office, in Southampton.

(a) 3 Atk. 582.

(b) 7 Ves. 267.

(c) 2 Atk. 39.

(d) Red. Tr. Ch. 257.

(e) 2 Ves. and Bea. 358.

2 Meri. 2 Prao. Reg. 12.

(f) Ord. Canc. Be. Ed. 452.

3 Atk. 439.

Buildings, or out of Office-Hours before a Master, *at his Office*, in Southampton Buildings or Residence. The *Jurat* must be written at the Top of the Answer, on the left Hand, thus :

“ Sworn at the Public Office in Southampton Buildings, the 10th Day of June, 1824, before J. Stephen.”

To a joint and several Answer *Both sworn, &c.*, or *All sworn, &c.*: wherever the Answer is sworn, it must remain in the Custody of the Master, and the Clerk at the Public Office is intitled to a Fee of Half-a-Crown for attending at a Master's House or Chambers for an Answer, Plea, or Commission sworn to there, for entering it, and Delivery to the Clerk in Court (a).

After the Answer has been sworn to, the Defendant's Clerk in Court should be immediately informed, and he will take it from the Public Office; but before it is delivered to him, an Entry thereof is made by the Clerk, for which no Fee is paid. If the Clerk in Court attends the Defendant to the Master's House or Office, he takes the Answer when sworn, into his immediate Custody to file, annexing it to the Bill, marking at the Top the Day and Year, and subscribing his Name at the Foot, and entering it in the Six Clerks' Books; but an Answer sworn to and left at the Public Office, or with the Master, is not considered as an Answer until filed of Record: to prevent an Attachment, or Injunction, or to stay Trial it must be filed the Evening before the Seal (b).

By the general Course of Practice, all Answers must be put in upon *Oath, Affirmation*, or *Attestation upon Honour*, and the standing Orders require the *Signature* of the Defendant (c); but this rule bends to Circumstances (d). By Consent an Order may be obtained to file an Answer without *Oath, Affirmation*, or *Attestation upon Honour* (e). If the

(a) Rep. of Fees. pa. 22.

(b) 2 Meri. 475. 1 Sim.
and Stu. 102.

(c) Ord. Canc. Be. Ed. 452.

(d) 1 Swan. 125.

(e) 1 P. Wms. 522.

Defendant be in England, an Order upon the Plaintiff's Application is of course, but if Defendant be abroad, his Consent is required (*a*). Where the Defendant was appointed to a judicial Situation abroad, and went away hastily, forgetting to sign his Answer, an Order was made upon the Plaintiff's Consent to take the Answer without Oath, and the Six-Clerk to receive it without Signature (*b*). The Answer of a Person resident abroad, who had given a Warrant of Attorney to a Person residing here to defend Suits, &c. has been allowed to be put in without any Signature, rather than taking the Signature of any other Person for the Defendant (*c*); and a like Order was made where a Father had an Authority to act for his two Sons who were out of the Jurisdiction, their Answers were ordered to be taken without Oath or Signature (*d*). Where the Defendant to a Bill of Foreclosure had gone abroad under Orders of Government, immediately after the Service of Subpœna, an Appearance before he had Time to put in his Answer, by Consent, the Six-Clerk was ordered to receive the Answer, though not signed by the Defendant (*e*); but a similar Application to take an Answer, without Oath or Signature of a mere Trustee, from imbecility of Body and Mind incapable of putting in an Answer, has been refused; the proper Course being to appoint a Guardian to put in the Answer, where there is no Commission of Lunacy, than to let the Defendant answer at all Hazards, without Oath or Signature (*f*). In one Instance, where the Suit appeared to be frivolous, a Quaker has been allowed to put in an Answer without Affirmation (*g*); but by the general Rule of Practice, the Signature to an Answer taken without Oath, must be attested by the Defendant's Solicitor, or by some respectable Witness, without which it cannot be filed: Where a Clerk to a Solicitor attested the Signature to an

(*a*) 18 Ves. 468.

(*b*) 6 Ves. 285.

(*c*) 10 Ves. 441.

(*d*) 12 Ves. 159.

(*e*) 6 Ves. 171.

(*f*) 14 Ves. 172. 1 Madd.
Rep. 321.

(*g*) 1 P. Wms. 780.

Answer put in without Oath by a Party he had never even seen, the Answer was suppressed, and the Clerk threatened to be committed for a Contempt; for the Purpose of Civil Justice, it is as much regarded as if with the caution of an Oath.

If a Defendant residing within twenty Miles of London, be incapable from bodily Infirmary or temporary Illness of attending to swear to his Answer in Town, usually the Master at the Public Office, or in his Absence, one of the other Masters sometimes will attend the Party to take his Answer, accompanied by the Clerk from that Office. When the Master goes out of his own Office or the Public Office to any Part of London or Westminster, or not beyond the Pavement of Southwark, Horsemonger-lane, or the King's Bench Prisons, he is intitled to a Fee of two Guineas, and in proportion to the Distance, a larger Fee of three, four, or five Guineas; but if he goes the farthest Distance, twenty Miles, his Fee never exceeds the latter Sum (a), and the Clerk's Fee, 6s. 8d. to whose Custody the Answer when sworn to is committed: but upon Affidavit of the special Circumstance, that the Defendant is ill and unable to travel, an Order may be obtained upon Motion as of course, or by Petition to the Master of the Rolls, supported by the Affidavit, for a Commission to take the Defendant's Answer (b), and proceeded upon in the usual Course.

The Answer of a *Peer or Peeress*, (which since the Union with Ireland has been extended to Irish Peers) (c), or of a Lord of Parliament, is put in upon Attestation of Honour (d), and not upon Oath. The Attestation is written upon the Answer, and signed by the Master before whom it is made, for which the Clerk at the Public Office is intitled to a gratuitous Fee of Half-a-Crown (e). A *Quaker* puts in his Answer upon solemn Affirmation and Declaration and not on

(a) Com. Rep. of Fees 14.

(d) Ord. Cano. Be. Ed. 105.

(b) Anderson v. Campden, Hil. 1794. MSS.

262. 1. P. Wms. 146. 1 Ves. and Bea. 421.

(c) 8 Ves. 601. 18 Ves. 469.

(e) Com. Report on Fees, 23.

Oath (a); but if a Defendant, assuming to be a Quaker, files an Answer as such without Oath, he will not be allowed upon an Indictment for Perjury to contradict the Assumption (b). A Jew is sworn to his Answer upon the sacred Pentateuch, or the Five Books of Moses (c). The Answer of a Corporation aggregate is put in under their common Seal, and not upon Oath; and there being no Remedy against them for Perjury, the Clerk, Book-keeper, or Secretary to a Corporation is usually made a Party, which is always the Case if a Discovery of Entries in their Books, or any Act done is required, his Answer must be upon Oath, and a Demurrer for want of Interest has been overruled (d): a Foreigner resident here, unacquainted with the English Language, may put in his Answer in his own Language, annexing a Translation into English by an Interpreter appointed by an Order obtained as of course, on Motion or by Petition to the Rolls. When the Answer is put in, the Order must be produced, and the Interpreter sworn to the Truth of the Translation, and also to interpret the Oath to the Foreigner attending to be sworn to his Answer (e).

If the Defendant resides above twenty Miles from London, which is termed a *Country Cause*, he may *crave a Dedimus*, to take his Answer returnable in the Term following; he is therefore seldom called upon till then for an Answer; but the Plaintiff by issuing Process for want of Answer, may compel a Defendant to take out a Dedimus, after the eight Days exclusive of the Day of Appearance have expired. An ordinary Dedimus or Commission to take an Answer only is made out by the Defendant's Clerk in Court, as of course, without any Order, upon Instructions from the Defendant's Solicitor (f); each Party names his

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| (a) Ord. Canc. Be. Ed. 247. | (d) 3 P. Wms. 321. 1 Veg. |
| 1 P. Wms. 781. 19. Geo. 426. | 7 Ves. 289. 14 Ves. 245. |
| 2. c. 18. | (e) 3 Bro. C. C. 263. 4 |
| (b) 2 Anstr. 479. | Bro. C. C. 90. |
| (c) 1 Vern. 263. | (f) 3 Madd. 42. |

own Commissioners, usually two on each Side. The Defendant's Solicitor furnishes his Clerk in Court with the Names of two Persons as Commissioners for the Defendant, and the latter then calls upon the Plaintiff's Clerk in Court for Commissioners' Names, by leaving a Note in Writing for that Purpose. In amicable Suits, the Names of two or more Persons are usually given, when required, with Directions upon which of them Notice of executing the Commission should be served: the Defendant's Clerk in Court makes out the Commission, expressing in the Label of the Commission, the Name of the Plaintiff's Commissioner to whom Notice of the Execution is to be given: in adverse Suits if the Plaintiff's Clerk in Court neglects or refuses to give Commissioners' Names, or to consent to the Defendant issuing the Commission *ex parte*, an Order, as of course, must be obtained by Petition to the Master of the Rolls, for the Plaintiff's Clerk in Court to name Commissioners in two Days after Notice of the Order, or in Default, that Defendant may take out a Commission directed to his own Commissioners (*see Petitions*). The Order drawn up, passed, and entered at the Register Office, must be served as usual, on the Plaintiff's Clerk in Court. If within the Time prescribed by the Order, the Plaintiff's Clerk in Court being again called upon, does not give Commissioners' Names, the Defendant's Clerk in Court is at Liberty to make out and seal a Commission *ex parte*. Here it should be remarked, that under an *ordinary Dedimus*, an *Answer only* can be taken (*a*); If a Plea and Answer, or a Plea only (*b*) is to be put in, an Order must be obtained by Motion, as of course, or more conveniently by Petition to the Master of the Rolls, for a *Dedimus* to take Defendant's Plea, Answer, or Demurrer not demurring alone, which is termed a *special Dedimus*, and if it be the first Application, six Weeks' Time to return it, with the usual Directions, for a Commission, &c.; and if the

(*a*) 2 Vern. 275.

(*b*) 2 P. Wms. 464.

Defendant at the Expiration of that Period be not then prepared, he is entitled to a second Order for a Month, and subject to the Restrictions of the Order of the Court of 1794 (a), he will be allowed three Weeks further Time; if by any Mistake in the Instructions to Counsel, the Order is drawn up for Time *to answer only*, the Court will not correct the Error, by extending it to plead Answer or Demur (b); but a Plea has been held to be an Answer within Terms of an Order for Time to answer (c).

When the Commission has been made out and Sealed, the Defendant's Clerk in Court sends it to the Solicitor to be executed; for which Purpose, six Days' notice in Writing, of the Time and Place, exclusive of the Day of executing must be given to the Plaintiff's Commissioner as directed by the Label (d), for which the following Form may serve.

“ We whose Names are hereunto subscribed, having received a Commission issuing out and under the Seal of the High Court of Chancery, to us and Others directed to take the Answer of William Johnson, Defendant, to the Bill of Complaint of John Lawrence and Others, Complainants in a Cause now depending in the said Court; We do hereby give you Notice, that we intend to Execute the said Commission, on Wednesday the twentieth Day of June instant, between the Hours of twelve and one in the Afternoon, at the House of George Griffin, situate at Kinderton, in the Parish of Middlewich, in the County of Chester, at which Time and Place you are required to be present, to see the Same taken. Given under our Hands, this thirteenth Day of June, 1824.

Ralph Leycester.

Henry Vernon.

To Robert Leake, Esq. Attorney at Law,
Plaintiff's Commissioner.

(a) Infr. 520.

(c) 2 P. Wms. 464. Bro.

(b) 10 Ves. 444. 1 Ves. and C. C. 56. 16 Ves. 355.

Bea. 184.

(d) 3 Pra. Alm.

If the Commission issues *ex parte*, Notice is not given to any of the Parties. One Commissioner attending on each Side is sufficient, but if none attend on the Part of the Plaintiff, the Commission requiring two Commissioners to take and Return the Answer and Commission, two of the Defendant's Commissioners must proceed in the Execution of the Commission.

The Defendant's Solicitor having ingrossed the Answer upon Parchment, if there are any Schedules referred to, they must be annexed to the Ingrossment, and if Counsel has signed the Answer, it would be proper to put his Name to the Ingrossment, but neither an Answer nor a Plea taken by Commission, require the Signature of Counsel (*a*); the whole Answer must be read over by the Defendant, or if he is an illiterate Man, read over to him, after which he usually signs his Christian and Surname in words at length at the Foot of the Answer, but in strictness, he ought to sign it in the Presence of the Commissioners (*b*): the Commissioners and the Defendant attend at the Time and Place appointed by the Notice, one of the Commissioners opens and reads over the Commission, and addressing himself to the Defendant, asks him if he has heard the Answer then produced read, and if he exhibits it as his Answer to the Bill of Complaint of *John Lawrence and others*, and if the Name thereto set and subscribed, is his proper Hand-writing, the Defendant answering in the Affirmative, one of the Commissioners then administers the following Oath to the Defendant, laying his right Hand on the Bible or New Testament:

“ You swear that what is contained in this your Answer, as far as concerns your own Act and Deed, is true to your own Knowledge, and that what relates to the Act and Deed of any other Person or Persons you believe to be true.”

So help you God.

(*a*) Red. Tr. Ch. 255. 4
Madd. 366.

(*b*) Ord. Canc. Be. Ed. 452.
3 Atk. 439.

The Answer and Schedules, thus sworn to, must be annexed to the Commission, and a Caption thereof written at the Foot of the Answer, and subscribed by two of the acting Commissioners, usually in the following Form:—

This (Plea and) Answer was taken, and the above-named William Johnson, the Defendant, was duly sworn to the Truth thereof on the Holy Evangelists, (and the Demurrer of the said Defendant was taken without Oath,) at the House of George Bostock, situate at Kinderton, in the Parish of Middlewich, in the County of Chester, on the twentieth Day of June, in the fourth Year of the Reign of His present Majesty King George the Fourth, and in the Year one thousand eight hundred and twenty-four, by Virtue of the Commission hereunto annexed before us,

Ralph Leycester.

Henry Vernon.

The Commissioners must be correct in the Caption; if it be the joint and several Answer of two or more Defendants, it must be so expressed, and that they were *both sworn*, or *all sworn*, as the Case may be; the Answer might otherwise be objectionable, and suppressed for irregularity (a); and if it be an Answer, or a Plea and Answer, or a Plea, Answer and Demurrer, or a Plea only, it must be so stated.

The Caption thus subscribed by two of the Commissioners, they make their Return by endorsing on the Commission near the Middle,

The Execution of this Commission appears in a certain Schedule, (or Schedules if more than one) hereunto annexed.

Ralph Leycester.

Henry Vernon.

The Commission must be annexed to the Answer and Schedules, (if any) the Commissioners then fold up the

(a) Mos. 238.

whole, leaving out the Label of the Commission, binding it round with Tape, upon the Crossing of which they set their Seals, and upon some Part they subscribe their Names, with the Name of the Cause and the Court, directing it to the Defendant's Clerk in Court at the Six Clerks' Office, Chancery-lane, London.

If one of the Commissioners brings the Commission up to London, he may deliver it to the Defendant's Clerk in Court, or to his Writing Clerk at his Seat, in the Chancery Office, and it is then received without Oath of the safe Custody and Carriage, and an Indorsement is made thereon of the Date and Receipt *without Oath by the Hands of the Commissioner*; if it is sent by any Person not a Commissioner, the Defendant's Clerk in Court takes him to the Public Office in Southampton Buildings, to be sworn before the Master there, *that he received it from the Hands of one or more of the Commissioners therein named, and that it has not been opened or altered since he so received it*, and an Indorsement of the Date and Receipt, *upon the Oath of the Bearer*, is made thereon, for which one Shilling is paid, and a Fee of five Shillings to the Bearer, and the Expences of carriage: or in the Absence of the Clerk in Court out of Office Hours, the Bearer may be sworn by the Master at the Public Office, or taken by the Clerk there, and sworn before a Master at his House, or Office, for which the Clerk at the Public Office is entitled to a Fee of six Shillings and eight Pence (*a*), and the Answer is left in his Hands at the Public Office, from whence the Defendant's Clerk in Court takes it away to file, or the Master before whom it is sworn, brings it with him and leaves it at the Public Office, and the Clerk's Fee is 2s. 6d. (*b*).

The Caption of the Answer of a Peer, or Peeress, or of a Lord of Parliament, upon Attestation of Honor, is in the following Form addressed to the Party.

(*a*) Com. Rep. of Fees, 22. (*b*) Ibid.

My Lord,

So much of this your Answer as concerns your own Acts or Deeds, you wage your Honor to be true, and that so much as concerns the Acts and Deeds of any other Person or Persons, you believe to be true.

The Nobleman lays his Hand upon his Breast, answering, *I do.* And the Caption is as follows:

“ This Answer was taken upon the Protestation of Honor of the Defendant, the Marquess of,” &c.

The Caption of an Answer of a Corporation Spiritual or Temporal, may be in this Form :

This Answer of the above-named Defendants, the Dean and Chapter of the Cathedral Church of York, was taken under the Common Seal of the said Dean and Chapter, as by the said Seal affixed appears, &c.

And of a Corporate City or Town, thus :

This Answer of the above Defendants, the Mayor, &c. of the City of Chester, was taken under the Common Seal, of the said Corporation, as by their said Seal affixed appears, &c.

Where an *Infant Defendant* resides above twenty Miles from London, or Abroad (a), a Guardian *ad litem* is appointed by Commission (b) : if the Person to be appointed Guardian resides at a like Distance, a Commission to assign a Guardian, and to take the Answer of the Infant by such Guardian, will be required ; but if the Answer is to be taken without Oath, or if the Guardian resides in London, he may swear to his Answer at the Public Office there ; in such Case a Commission to assign a Guardian only will answer every Purpose ; to authorize the Clerk in Court to make out either of these Commissions, an Order must be obtained on Motion as of course, or by Petition to the Mas-

(a) 14 Ves. 172. Red. Tr. (b) 11 Ves. 563.
Ch. 94.

ter of the Rolls, for a Commission to assign a Guardian to the Defendant the Infant, and to take his Plea, Answer, or Demurrer, by such Guardian; the Order drawn up, passed and entered, must be served upon the Plaintiff's Clerk in Court, and the original Order left with the Defendant's Clerk in Court, with Commissioners' Names to insert in the Commission, and he will in the usual Course call upon the Plaintiff's Clerk in Court for Commissioners' Names, and in default make out the Commission *ex parte*; if the Application is merely to assign a Guardian, the Order for the Commission is not served, the Defendant's Clerk in Court makes out the Commission upon receiving Instructions with Commissioners Names, *ex parte*. To carry the former of these Commissions into effect, the Defendant's Solicitor must as in ordinary Cases give six Clear Days' notice in Writing to the Plaintiff's Commissioner of the Time and Place appointed (a) as directed by the Label; (if the Commission issues *ex parte* Notice to the Parties is not necessary,) two or more Commissioners must attend at the Time and Place appointed by the Notice; one of the Commissioners opens the Commission, and the Infant *being personally present*, the Person to be appointed Guardian is proposed to the Commissioners; if he appears to be a proper Person, and not interested in the Suit, the Commissioners appoint him Guardian to the Infant, to answer and defend the Suit, and if his Answer be ready engrossed, he may immediately *after the Appointment* exhibit it in the ordinary Course as his Answer on behalf of the Infant, to which he must be duly sworn as in proceeding to take the Answer of an Adult before-mentioned (b); a Certificate of the Appointment, and of the Caption must be written at the Foot of the Answer, and subscribed by two or more of the acting Commissioners, in the following Form, and the Answer annexed to the Commission, with the usual Return thereon, subscribed in like Manner.

(a) Ant. 543.

(b) Ant. 544.

To the Right Honorable the Lord High Chancellor of Great Britain.

We whose Names are hereunto subscribed, in pursuance of a Commission to us and others directed, have caused Richard Roe, the Infant to come before us, who chose B. J. C., of Agden, in the County of Chester, Bart. to be his Guardian, to answer and defend this Suit on his behalf, and we have assigned and appointed the said B. J. C. to be his Guardian, accordingly. And the said B. J. C. at Agden, in the Parish of Rostherne, in the County of Chester, was this tenth Day of June, 1824, sworn upon the Holy Evangelists, to the Truth of the Answer of the said Richard Roe, as his Guardian by Virtue of the said Commission before us.

George Leycester.

Peter Brooke.

The whole closely folded up and under Seal of the Commissioners, is directed to the Defendant's Clerk in Court in the Six Clerks' Office, and the Course of Proceeding taken as in executing Commissions before treated of.

To appoint a Guardian ad litem only to an Infant by Commission, the Defendant's Solicitor must obtain an Order as of course by Motion, or more expeditiously by Petition to the Master of the Rolls, (see Petition) the Order passed and entered must be left with his Clerk in Court, with Commissioners' Names to be inserted in the Commission, which is made out ex parte, and when sealed, sent to the Solicitor; a Time and Place for executing the Commission must be appointed by the Infant's Solicitor, but no Notice is given to the Plaintiff; two of the Commissioners must attend, and the Infant must be produced in person before them at the Execution of the Commission, or dispensed with by Order (a); but the Attendance of the Guardian

(a) 1 Madd. Rep. 290.

may be dispensed with; if the Person so proposed be a fit and proper Person, and not in any degree interested in the Suit; the Commissioners proceed to appoint him Guardian for the Purposes of the Commission, a Certificate of which must be ingrossed upon Parchment, and annexed to the Commission, the Form of which is as follows.

In Chancery.

Between John Delves, Plaintiff,
and
Peter Brooke, Defendant.

*To the Right Honorable the Lord High Chancellor of
Great Britain.*

We whose Names are hereunto subscribed, in pursuance of a Commission to us and others directed, have caused Charles Dutton, the Infant, to come before us, who chose Sir J. Chetwode, of Agden, in the County of Chester, Bart. to be his Guardian, to defend this Suit on his behalf. And we have assigned and appointed the said Sir J. C. to be his Guardian accordingly, at the House of Peter Brooke, Esq. at Mere, in the said County of Chester, on the fourth Day of November, 1824. By Virtue of the Commission hereunto annexed.

Ralph Leycester,
Henry Manwaring.

This Certificate must be annexed to the Commission, and a Return, usually in the following Form, endorsed on the Commission, and subscribed by two of the acting Commissioners.

The Execution of this Commission appears in a certain Schedule hereunto annexed.

Ralph Leycester,
Henry Manwaring.

The Commission and Certificate annexed is folded up, and sent to the Defendant, the Infant's Clerk in Court, at the Six Clerks' Office, to be carried into effect as occasion may require.

If the Guardian so appointed resides in London, and the Infant's Answer by Guardian is to be put in upon Oath, the Guardian must attend at the Public Office, in Southampton Buildings, and the Certificate of his Appointment must be produced, and the Answer will then be sworn and expressed in the Jurat as the Answer of the Guardian assigned by that Certificate; and the Answer when brought from thence by the Defendant's Clerk in Court to the Six Clerks' Office, must be annexed to the Commission and Certificate, and filed in the usual manner by the Six Clerk. If the Guardian resides in the Country, at a Distance from the Infant, the Answer of the Guardian may be taken under an Order for a Commission to take the Infant's Answer by his Guardian *already assigned*, and the Caption should express that *the Answer was taken, and the within named B. J. C. as Guardian already assigned, was duly sworn to the Truth thereof on the Holy Evangelists, &c.* as in ordinary Cases. If the Answer of the Guardian is to be taken *without Oath*, the Order for that Purpose, and the Answer, properly ingrossed and signed by the Defendant, and the Signature attested, must be left with the Infant's Clerk in Court, who, previous to putting it upon the file, writes thereon, *Without Oath, by Order dated 4th of June, 1824.* Where a Guardian has been appointed by Commission to put in the Answer of Infants out of the Kingdom, the same Guardian has by Order been allowed to put in their Answer to a Supplemental Bill (a); and if a Co-Defendant, to sign only once (b).

The Committee of a Defendant under a Commission of Lunacy, unless interested in the Cause, is usually appointed

(a) 6 Madd. 28.

(b) 2 Ja. and Wa. 553.

his Guardian, to answer and defend the Suit : a Guardian to put in the Answer of a Lunatic, verified to be such by Affidavit, has been appointed on the Motion of the Plaintiff (*a*).

A Person by Infirmary of Body and Mind, or by Age, or by any other Means incapable of managing his own Concerns, where a Commission of Lunacy has not been issued, may have a Guardian assigned for the Purpose of putting in an Answer and defending a Suit (*b*) : for this Purpose an Application must be made by Motion, or by Petition to the Master of the Rolls, upon Affidavit of the Facts and Circumstances ; in which the Opinion of a medical Person would be a strong auxiliary Ground for an Order to appoint a Guardian, or for a Commission to issue for that Purpose : the Affidavit must be filed, and an Office-Copy taken from the Affidavit Office, annexed to the Petition, or given to Counsel upon the Application : the Order must be drawn up, passed, and entered, and if it be referred to a Master to appoint, the Order must be left with him, a Proposal and State of Facts left and proceeded upon, and the Report filed at the Report Office ; but if a Commission is directed, the Order must be served upon the adverse Clerk in Court, and the usual Instructions given to the Defendant's Clerk in Court, and the same Course of Proceeding followed as in Commissions for assigning Guardians for Infants ; the Commissioners must attend the Defendant *personally*, and appoint a Person to be Guardian, and take the Answer by such Guardian ; and the usual Return to the Commission must be made thereon, and subscribed by the Commissioners, and similar Proceedings followed as in taking and returning Commissions for appointing and answering by Guardian to Infants : or if the Plaintiff will accept the Answer without Oath, the Commission may be restricted to the Appointment of a Guardian only. The Appointment may be certified in the following Form :

(*a*) 5 Madd. 423.

(*b*) Prec. Ch. 329. 14 Ves. 172.

In Chancery.

Between John Delves,
and
Peter Brooke.

To the Right Honourable the Lord High Chancellor of
Great Britain.

We humbly certify to your Lordship, that by virtue of the Commission hereunto annexed, we have called *Mary* the Wife of *George Dutton*, a Person of unsound Mind, before us; and we have this 10th Day of *June*, 1824, assigned *James Delves* to be her Guardian, by whom she may answer the Plaintiff's Bill and defend this Suit, and the Answer, of &c. (as in Guardians to Infants) (a).

Peter Shakerley.

George Leigh.

Where a Feme Covert is in the State above-mentioned, and deserted by her Husband, an Order must be obtained as of course, by Motion or Petition to the Rolls, to put in her Answer separate from her Husband, without which the Answer cannot be regularly filed.

As incidental to the Pleadings, it would be improper to pass over without Notice the *Amendment of an Answer* filed of Record: any Alteration in a Proceeding sanctioned by the Oath of a Party or of a Stranger, has been regarded with great Jealousy; in small and immaterial Matters (b) the Course of the Court formerly was, to allow the Record to be altered, and in some Instances to be taken off the File, re-ingrossed and re-sworn. Where a Defendant had mistaken a *Fact* or a *Date*, the Court gave leave to amend the Record, and so in Mistakes of Names, or in the In-grossment of the Answer (c), and it has been allowed upon

(a) Ant. 548.

(b) Bunb. 248.

(c) 2 P. Wms. 426. 9 Ves.
365. 10 Ves. 284. 11 Ves. 63.

Discovery of new Matter (*a*), or Surprise (*b*); but in the Case of Answers, as of Pleas put in upon Oath, the Court, for obvious Reasons, will not easily suffer any Change to be made (*c*). Lord Thurlow, in many Instances, refused Leave to amend an Answer (*d*); and by the more recent Decisions of Lord Eldon, when a Defendant comes to deprive the Plaintiff of the Benefit to which he is entitled from the Answer upon record, the Court has held it more proper to keep the first Answer upon the File, that Justice may be done in every Point of view in which the Answer was sworn; and the Course has since been, and the general Practice now is, to allow a Defendant by a *Supplemental Answer* to state what he can to correct or vary his former Answer, instead of the old Form of amending the Record, or taking it off the File (*e*). Where a Supplemental Answer will operate to the *Prejudice* of the Plaintiff, Lord Eldon has held it to be Matter of great Difficulty to permit it to be filed, though the Court be inclined to yield to the Application; if the Object be to remove out of the Plaintiff's Way the Effect of a Denial, or to give him the Benefit of an Admission, material, perhaps conclusive, to enable him to obtain a Decree (*f*); and before a Defendant will be allowed to withdraw a Statement beneficial to the Plaintiff, the Court must be satisfied that Justice demands such a Benefit to the Defendant; to secure that Effect, and to enable the Court to judge of the Reasonableness of the Application, the Party applying for this Permission has in every Instance been required to give a *precise Statement* of what he wishes to put upon the Record (*g*); and it should be further remarked, that an Amendment of an Answer will not be permitted after an Indictment for Per-

(*a*) Ambl. 292. 10 Ves. 401.

(*d*) 2 Ves. & Bea. 256.

(*b*) 1 Eq. Ca. Abr. 29. 2
Bro. C. C. 619. 3 Atk. 522.

(*e*) 1 Bro. C. C. 419. 8 Ves.
79. 10 Ves. 285. 401.

(*c*) Red. Tr. Ch. 262.
Coop. 332.

(*f*) 2 Ves. & Bea. 257.

(*g*) 19 Ves. 630.

jury preferred or threatened in order to avoid the Indictment (*a*) ; at Law it has been held that upon an Indictment for Perjury in an Answer, to which Exceptions have been taken and a second Answer put in giving an Explanation, that nothing can be assigned as Perjury, which is explained by the second Answer, because the latter makes that which was at first Perjury, no Perjury at all (*b*) ; upon which Lord Eldon expressed a Doubt, but that the Habit of this Court is to consider an insufficient Answer as no Answer ; if the Exceptions produce an Explanation, the two are taken as one Answer, and in favour of a Person accused, the Court might hold them as one Answer, containing the Explanation, with the Assertion constituting the Charge ; but his Lordship expressed great Difficulty in acceding to the Proposition, for that the Permission to file a Supplemental Answer ought to have no Influence on a Prosecution for Perjury (*c*). Upon an Application for Leave to file a Supplemental Answer, supported by an Affidavit that Defendant had taken Possession of Part only of the Premises in question, having previously sworn in his Answer to have been in Possession of the Whole, and that the Mis-statement was merely from not conceiving it to be material, the Motion was refused, without an Affidavit, that when the Defendant swore to his former Answer, he meant to swear to the Fact, in the Sense he then desired to be at liberty to swear to (*d*) : and where the Supplemental Answer is permitted to correct a Mistake, it is held strictly to a Mistake clearly sworn to, and probable in itself (*e*). On a Defendant's Affidavit, that at the Time of putting in his former Answer, he had no Recollection of a Fact, which he had discovered since, Leave was given to file a Supplemental Answer (*f*) : and in Schedules annexed to an Answer, where

(*a*) 1 Bro. C. C. 419. 2 Ves.
and Bea. 257. 1 Cox. 281.

(*b*) 1 Sid. 418. 2 Keb. 516.

(*c*) 2 Ves. and Bea. 166. 257.

(*d*) 1 Ves. and Bea. 149.

(*e*) 2 Ves. and Bea. 163.

(*f*) 2 Ves. and Bea. 256.

Dick. 33. 485. 1 Bro. C. C. 418.

a material Error had been discovered in taking the Accounts before the Master, upon Petition and Affidavit accounting for the Error, the Defendants were allowed to put in a Supplemental Schedule (a); but the Court will not suffer itself to be taken by Surprise, and under Colour of correcting an Error, allow a Defendant by Supplemental Answer to make a new Defence inconsistent with his former Answer: where Leave was given, and a Supplemental Answer was filed, which not only corrected the Mistake, but also set out a fresh Account inconsistent with, and materially altering the Account stated in the former Answer, making out a totally new Case, and not supported by the Affidavit upon which the Order for filing the Answer was made, Lord Eldon *brevi Manu* ordered the Supplemental Answer to be taken off the File (b). Where a Defendant by Answer admitted the Title of the Vendor, and afterwards discovered a Will supposed to affect the Title, whether he would be allowed by Supplemental Answer to take the Objection, has been doubted (c): after a general Admission of Assets, where a Claim has come in, exceeding the Amount of the Assets, upon Application for Leave to file a Supplemental Answer, supported by an Affidavit of the special Circumstance, Leave has been given, but without Prejudice as to what Effect the Admission in the former Answer ought to have at the Hearing (d); and after a general Admission of Assets, Leave has been given to amend the Answer, by qualifying the Admission to pay Debts, if they do not exceed a certain Sum; (e) if a strong Case be made out, the Court will relieve the Executor from his Admission of Assets, as in the Instance of Money placed in a Banker's Hands, who fails, to obviate an Admission, a Mistake must be proved, and that the Circumstance on which the Executor

(a) 4 Madd. 404.

(b) 2 Ves. and Bea. 167.

(c) 2 Meri. 57.

(d) *Skerritt v Wellington*.

Jan. 1807. MSS. Dick. 573.

(e) 2 Bro. C. C. 619.

relied, failed (*a*). Where there has been a mere Mistake in the Name, an Answer has been allowed to be taken off the File and re-sworn, and a Defendant has been allowed in availing himself of the Mistake, to correct a Fact sworn to in the Answer; the Court holding that he was not bound by the Answer, has allowed it to be taken off the File, by the Description of a Writing purporting to be an Answer (*b*); and an Answer intitled the Answer of five Defendants, where there were six, has been ordered to be taken off the File, although a Year had elapsed (*c*). An Application to swear an Answer, purporting to be the *joint Answer* of five Defendants, as the Answer of three only, has been refused (*d*). Recently, where the Answer was entitled, the *joint and several Answer* of two Defendants, but sworn by only one (*e*), it was ordered to be received as the Answer of the Defendant who swore it without striking out the Names of those who refused to join (*f*); but where the Words, “to the Bill of Complaint,” were omitted in the Title of the Answer, it has been taken off the File (*g*); an Answer has been allowed to be taken off the File to be amended and re-sworn, upon an Undertaking to swear the same Answer and upon Payment of Costs (*h*); but it should be observed that wherever an Answer is amended, although it be only in the Title, the Answer so amended must, in the Case of a Peer, be again attested upon Honour, and in the Case of a Commoner, re-sworn, before it can be filed (*i*).

To file a Supplemental Answer, an Order must be previously obtained by special Motion on Notice, or by Petition, stating the Supplemental Matter, supported by the Defendant's Affidavit of the special Facts and Circumstances, upon which the Application is grounded, and an

(*a*) 1 Bro. C. C. 487. 1 Ves. 85.

(*b*) 11 Ves. 62.

(*c*) 1 Bro. Rep. 83.

(*d*) 3 Madd. C. C. 399.

(*e*) 1 Madd. Rep. 265.

(*f*) 2 Ves. and Bea. 310.

(*g*) Coop. 249.

(*h*) 1 Madd. Rep. 269.

(*i*) 1 Ves. and Bea. 186.

Allegation, that at the Time of putting in the former Answer, the Defendant did not know the Circumstance upon which he makes the Application, or any other Circumstance upon which he ought to have stated the Fact otherwise (*a*) ; it should be observed, the Whole of the Supplemental Matter must be comprised in the Affidavit, which must be filed at the Affidavit Office, and an Office-Copy taken, and if necessary, an Affidavit of Service of the Notice or Petition upon the Plaintiff's Clerk in Court, and proper Instructions given by Brief to Counsel; upon the Application the Solicitor must attend the Court; probably in an adverse Suit, the Minutes made upon the Hearing would require strict Attention, and in settling them, the whole of the Supplemental Matter must be set out, and in strict Conformity thereto, the Order must be drawn up, passed, and entered at the Register Office, and served upon the Plaintiff's Clerk in Court, and the Supplemental Answer must be signed by Counsel, ingrossed, and sworn at the Public Office, or taken by Commission in a Country Cause, and the Order left with the Defendant's Clerk in Court, to authorize him to file the Supplemental Answer.

Lastly, it should be observed, that if a Defendant answer to any Part of the Bill to which he has demurred, he waives the Benefit of the Demurrer (*b*) ; or if he pleads to any Part of a Bill before demurred to, the Plea will overrule the Demurrer (*c*) ; nor can a Defendant by Answer, claim, what by Disclaimer he has declared he has no Right to : a Plea or Answer will overrule a Demurrer, and an Answer a Plea; and if a Disclaimer and Answer are inconsistent, the Matter will be taken most strongly against the Defendant upon the Disclaimer (*d*).

If the Plaintiffs should apply to the Court, on the Ad-

(*a*) 8 Ves. 79. 10 Ves. 401. (c) 2 Bro. P. C. 20.
 2 Ves. and Bea. 163, 256. (d) Red. Tr. Ch. 258.
 (b) 3 P. Wms. 79. 2 Atk. Coop. 310.
 157.

mission of the Defendants the Executors, of any Sums standing in their Names, or in the Name of their Testator, in the Public Funds, to have the same transferred to the Accountant-General in Trust in the Cause, the Defendants must by Counsel appear on the Motion, if they intend to object to the Transfer. But as it is not probable that any Objection can be made to the Application, it will perhaps be unnecessary to appear thereon. When the Order is drawn up, passed, and entered, Application should be made to the Plaintiffs' Solicitor for the Order, which must be left at the Accountant-General's Office, to have Tickets made out, by which the Transfer may be made; without these Tickets the Accountant-General will not receive the Stock, nor will the Bank of England permit a Transfer into his Name. The Transfer Tickets must be taken to the Bank, and the Transfer may be made, either by the personal Attendance of the Executors there, or by their Attorney, duly empowered by a Letter of Attorney from the proper Office in the Bank. When the Stock is transferred, the Accountant-General has Certificates thereof, which he files at the Report Office, and delivers Office-Copies to the Solicitor.

The Court adopts as a general Rule, the Investment in the 3l. per Cent. Consols Annuities, as most beneficial to the Suitors of the Court, and never varies from this Rule without special Circumstances (*a*); but where the Dividends were directed to be paid to the Tenant for Life in January and July, the Court ordered the Investment to be in the 3l. per Cent. Reduced Annuities, which are payable at those Periods (*b*).

MICHAELMAS TERM, 1820.

In this Term a Bill of Revivor being filed, occasioned by the Death of one of the Plaintiffs, against a Defendant entitled to Letters of Administration, after he has been served with Subpoena, an Appearance must be entered for

(*a*) 4 Madd. 191.

(*b*) 4 Madd. 189.

him in the usual Course (*a*). If the Bill should be to revive only, in general it may not be necessary to put in any Answer, the Plaintiffs will revive the Cause, by obtaining an Order for that Purpose as of course, on the Time for answering being expired, unless the Defendant obtains an Order for Time to Answer (*b*); and as upon an original Bill, he is entitled to all the three Orders for Time (*c*): but if the Bill filed should be a Bill of Revivor and Supplement, and if the new Matter require an Answer, the Defendant must put in an Answer (*d*); upon which the Plaintiffs will obtain an Order that the Cause may stand revived: after a Decree, a Defendant upon putting in an Answer, may obtain an Order to revive (*e*); or on Death of Plaintiff if not revived, the Bill be dismissed with Costs.

When all the Answers are filed, and the Plaintiffs have replied, and served Subpoenas to rejoin, as the Plaintiff cannot amend his Bill, but by special Application, shewing that using all due diligence on his part, and those employed by him, he was not in a Condition to apply sooner (*f*); it would be advisable for the Defendant's Solicitor to lay a Brief of the Pleadings before Counsel, to consider the Evidence required to support the Defendant's Case. If Witnesses are to be examined *in Town*, the Course of Proceeding to prepare and file Interrogatories, the Examination of those Witnesses, and other incidental Matters, partake so much of the like Course on the Part of the Complainant, that a Reference to a former Part of this Work will be sufficient (*g*).

The Plaintiff's Bill of Costs shews that a Supplemental Bill was filed, occasioned by the Bankruptcy of one of the Defendants. The Defendant's Bill comprises no Proceedings on that Subject, it being presumed that the Assignees'

(*a*) 3 Atk. 690. 2 Bro. C.
C. 127.

(*b*) 3 P. Wms. 348. 1 Ves.
180.

(*c*) Red. Tr. Ch. 72.

(*d*) 11 Ves. 312.

(*e*) 1 Meri. 154. Dick. 28.

10 Ves. 406. 1 Turn. R. 258.

(*f*) 6 Madd. 106.

(*g*) Ante, 190.

Answer was filed by the Solicitor under the Bankruptcy. And as the Solicitor has been sufficiently instructed in the Manner generally of putting in an Answer, it seems to be unnecessary to state any Thing further on this Head.

An Answer not replied to being taken as true, the Course of the Court is not to allow that Defendant to examine Witnesses in Court, or by Commission.

If the Plaintiff has not issued any Commission for the Examination of Witnesses in the Country, and the Defendant has Witnesses to examine, who reside above twenty Miles from London, beyond which the Examiners have no authority to act (*a*), the Plaintiff having the Privilege of first suing out, and the Carriage of a Commission to examine Witnesses (*b*), in which the Defendant is at liberty to join and Examine (*c*): if the Plaintiff has no Witnesses to examine in the Country, or neglects or refuses to issue a Commission, or if his Witnesses reside at a great Distance from the Defendant's Witnesses, or if he has been guilty of any very gross Irregularity in the Execution of a former Commission to examine (*d*): the Defendant for the Purpose of examining Witnesses above twenty Miles from London, must by Motion as of course, or more conveniently by Petition to the Master of the Rolls, (*see Petition*,) obtain an Order for a Commission to examine Witnesses, with the usual Directions for the Plaintiff's Clerk in Court, in four Days to join and strike Commissioners' Names, or in default that a Commission may issue *ex parte*, with liberty to execute it in Term Time; the Order must be drawn up, passed, and entered at the Register Office, and a Copy served with the usual Formalities upon the Plaintiff's Clerk in Court, and the original Order, with a List in Writing of the Names of four Persons as Commissioners on the Part

(*a*) Dick. 231.

(*c*) Dick. 793.

(*b*) 1 Prax. Alm. 17. 3 Atk. 593.

(*d*) Toth. 16. 3 Prax. Alm. 62.

of the Defendant, left with the Defendant's Clerk in Court, the Latter by a Note in writing, will call upon the Plaintiff's Clerk in Court, for Commissioners' Names on the Part of the Plaintiff; the Clerks in Court for the Respective Parties being each furnished with the Names of four Commissioners, they *join in Commission* by entering the eight Names in their *Commission Books* (a); the Names of the Persons proposed as Commissioners by the Plaintiff, are sent by the Defendant's Clerk in Court to the Defendant's Solicitor, and if any Apprehension be entertained, that some undue Advantage may be taken by the Appointment of an improper Person in this Stage the Objection should be taken (b): when the Defendants' Clerk in Court, has received Instructions for reducing the List of Names, he informs the Clerk in Court for the other Side, that he is ready to *strike Commissioners' Names*; the Commission Book with the Entry of the Names of the Commissioners is then produced, and two of the Names on each Side are struck through with the Pen, by the respective Clerks in Court; when the Defendant's Clerk in Court sues out the Commission, he has of course the Carriage of it, and his Clerk in Court first strikes out one of the Plaintiff's Commissioners' Names, and the Plaintiff's Clerk in Court then strikes out one of the Defendant's Commissioners' Names, and so alternately, one and the four remaining are appointed Commissioners: if the Plaintiff's Clerk in Court after Service of the Order, refuses to join in Commission, by not giving Commissioners' Names, the Defendant's Clerk in Court is at liberty to make out and seal an *ex parte* Commission, directed to his own Commissioners; but if the Adverse Clerk in Court joins in Commission, and afterwards refuses to strike Commissioners' Names, an Application must be made by Petition, with the Names annexed, to the Master of the Rolls,

(a) Ord. Cano. Bea. Ed.
113.

(b) 1 Swanst. 166. 1 Wils.
C. C. 155,

to strike Commissioners' Names, which is answered as of course, by striking out two of the Petitioner's Commissioners' Names, *see Petition*, and the Defendant's Clerk in Court then strikes out *ad libitum*, any two of the other Party's Commissioners, and the Commission is made out directed to the four remaining Commissioners, the printed Forms of the Oaths directed by the Commission to be administered to the Commissioners, and their Clerks is always annexed (a), and also a Label expressing the Names of the Commissioners, the Return of the Writ, and to whom Notice of the Execution is to be given; if the Commission issues *ex parte* Notice is not required; the Commission is made returnable on a general Return-Day, on a Day certain in Term, or without delay, if taken out in the Vacation and returnable without delay, it does not expire the first Day of the following Term, it may be continued in execution, the whole of that Term till the last Return (b); in Practice, however, it has been found convenient to limit the Time for the Return of Commissions returnable without delay: the Vice-Chancellor has recently laid down as a general Rule, that such Commissions must be returned *before the third Return of the following Term* (c); it should not escape the Attention of the Solicitor, that a Commission to examine Witnesses cannot be executed in Term Time without leave, which is granted of course, and should always form Part of the Application, and of the Order for the Commission.

If the Commission be a Joint Commission, the Solicitor suing out the Commission, usually arranges with his own Commissioners the Time and Place for executing it, of which a Notice in Writing subscribed by two or more Commissioners, must be served upon all the Parties joining in Commission as directed by the Label, fourteen Days

(a) Ord. Canc. Bea. Ed. 327.

(b) 3 Atk. 593.

(c) 1 Sim. and Stu. 95.

previous to, and exclusive of the Day appointed for the Execution; and in a Bill of Interpleader Notice by a Defendant to the Plaintiff, and not to the other Defendant is regular (a); the Notice may be to the following Effect,

We whose Names are hereunto subscribed, having received a Commission issuing out of and under the Seal of the High Court of Chancery to us and others directed, for the Examination of Witnesses in a certain Cause there depending between Peter Brooke, Plaintiff, and George Delves, Defendant, This is to give you Notice, that we will execute the said Commission on the behalf of the Plaintiff Peter Brooke, (or Defendant,) at the House of Thomas Lecke, known by the Sign of the King's Arms, situate at Middlewich, in the County Palatine of Chester, on Monday the 19th Day of July instant, at the Hour of ten o'Clock in the Forenoon of the same Day, when and where you and your Commissioners may be present, if you please: Dated 4th of July, 1824.

*To George Delves, Esq.
The above named Defendant.*

*Ralph Leycester,
George Bostock.*

The Witnesses to be examined may be produced by Summons, if they will voluntarily attend, or compelled by Summons and Subpoena to testify if they are unwilling to give Evidence; this Summons must be signed by two or more of the Commissioners, and directed to the Witness by Name, and *personally* served upon, and left with each Witness, a reasonable and sufficient Time before the Day appointed for the Execution of the Commission, usually with one Shilling conduct-Money; for the former Purpose, the following Form will be sufficient:—

(a) 1 Cox, 425.

In Chancery.

Between Peter Brooke Esq. Plaintiff,
and
George Delves Esq. Defendant.

“ Whereas we have received a Commission issuing out of and under the Seal of the High Court of Chancery at Westminster, to us and to others therein named directed, for the Examination of Witnesses in a Cause depending in the said Court, and now at issue between Peter Brooke Plaintiff, and George Delves Defendant. And whereas we are informed, that you whose Names are hereunder written, are material Witnesses on behalf of the said Plaintiff Peter Brooke. We therefore, by Virtue of the said Commission, do hereby will and require you and each of you, severally and personally to be and appear before us the said Commissioners, or any two or more of us, at the House of Thomas Leeke, known by the Name or Sign of the King's Arms, situate at Middlewich, in the County of Chester, on Monday, the 19th Day of July instant, at the Hour of ten of the Clock in the Forenoon of the same Day, then and there to be examined as Witnesses, and to testify the Truth according to the best of your Knowledge, for and on the behalf of the said Plaintiff, Peter Brooke; And you are then and there to attend, and not to depart until you have been examined on the Part of the said Plaintiff Peter Brooke, and herein you are not to fail. Dated this 4th Day of July, 1824.

*To Thomas Broughton. -
And John Manwaring.*

*Ralph Leycester,
George Bostock.*

Copies of the Summons and the Notice should be carefully kept by the Person who served them.

And where the Witness resides at any considerable Distance, his reasonable Expences must be paid or tendered

to him, he might otherwise not attend, or if he does, he might refuse to give Evidence until his Expences are actually paid or a Tender made (a) ; but it may be proper to remark, that no Process of contempt lies for a Disobedience to the Summons (b); the better, and more regular Course to enforce the Attendance of an unwilling Witness, is by Subpœna, to testify ; and if Deeds, Papers, Vouchers, or Writings, are in the Custody of a Witness, the Production must be enforced by *Subpœna duces tecum*, accompanied with the Commissioner's Summons, in which the documentary Evidence should be as specifically as in the Subpœna set forth, Instructions for which will be found in a former Part of this Work (c) ; this *Subpœna and Summons* must be *personally* served upon each Witness, by delivering to him the Writ under Seal, and the Commissioner's Summons, tendering at the same Time one Shilling for conduct-Money, or if he lives at a Distance his reasonable Expences : if the Witness having been regularly served with a Subpœna neglects or refuses to attend the Commissioners (d) ; or appearing refuses to be sworn (e) ; or if sworn, to give Evidence, or to assign a sufficient Reason for withholding his Testimony, or to produce the documentary Evidence described in the Subpœna, a Certificate in writing of such neglect, or refusal must be obtained from the acting Commissioners, and an Affidavit of the Personal Service of the Subpœna and Summons made and filed, and an Application made by Motion upon Notice for an Order, upon the Witness to attend the Commissioners at his own Expence, or if the Commission be closed, to attend the Examiner in Town, or in Default, that he stand committed to the Prison of the Fleet, or to the Custody of the Serjeant at Arms (f) ; the Order must be drawn up, passed, and entered at the Register

(a) Str. 1054.

(b) Dick. 334.

(c) Ant. pa. 192.

(d) Gilb. For. 145. Dick. 60.

(e) 12 Ves. 201.

(f) 12 Ves. 201.

Office, and a Copy personally served upon the Witnesses, shewing the original Order passed and entered, and Interrogatories for his Examination must be filed at the Examiner's Office as in a Town Cause, and if the Witness sits out in Contempt, the same Course of proceeding to enforce the Order, as in a Town Cause must be followed (*a*); if the Witness in fraud of the Subpœna secrete the Deed, perol Evidence may be given of the Contents.

The Commissioners and Witnesses having met at the Time and Place appointed by the Notice, the Commission, which till that Time, should remain under Seal, must be delivered by the Solicitor to the Commissioners one of whom breaks the Seal and reads it to the Others, the four Commissioners named in the Commission usually attend, one attending on each Side would be sufficient to execute the Commission, but to provide against the non-Attendance of any Commissioner for the adverse Party, the Solicitor having the Carriage of the Commission would act prudently in securing the Attendance of his own Commissioners, for although any two Commissioners having the Custody of the Commission, may act in the absence of all the other Commissioners, yet the presence of two Commissioners with the possession of the Commission, or a Duplicate of the Commission, is indispensable.

In carrying the Commission into effect, the Commissioners first administer the Oaths prescribed by the Commission to each other, and afterwards to the Clerks employed by them in transcribing and ingrossing the Depositions of the Witnesses. Interrogatories, as in a Town Cause (*b*), prepared and signed by Counsel (*c*), and ingrossed on Parchment, with the Counsels' Name subscribed, are exhibited by the Solicitors for the Parties joining in Commission, to the Foot of each Skin of which, the acting Commissioners sign their Names; the Practice formerly,

(*a* Ant. pa. 194.

(*b*) Ant. pa. 190.

(*c*) Ord. Canc. Be. Ed. 273.

was to prepare Interrogatories for both the Original and cross-Examination, before the Commission was opened, but the modern Practice in Country Causes, is to supply Interrogatories from Time to Time, until the supply of Witnesses is exhausted: and, says Lord Eldon, the Court has acted upon Examinations so taken and returned (a).

The Title of the Depositions preparatory to the Examination of the Witnesses, is drawn up by one of the Clerks, and written upon Paper Brief-wise in the following Form.

*“Depositions of Witnesses produced, sworn,
and examined, &c.” (b)*

If a Commissioner is to be examined as a Witness, he must be examined by the other Commissioners before any Witness is examined, after which he may proceed in the Execution of the Commission; if other Witnesses have been examined previously, his Deposition will be irregular, and may be suppressed (c); and so if a Clerk to the Commission is to be examined, his Examination must precede that of any other Witness, except a Commissioner under the same Commission (d); and if a Plaintiff, or a Defendant, or a co-Defendant is to be examined, the Order for his examination must be produced to the Commissioners: when a Peer is to be examined as a Witness, he must be so on Oath (e), and the like of a Peeress.

The Solicitor suing out the Commission is entitled to have his own Witnesses examined, before those produced on the other Side: previous to a Witness being examined, the Solicitor prepares a Note in Writing, of the Name of the Witness, his description, place of Abode, and Age, and to which of the Interrogatories he is to depose; and to give the opposite Party an opportunity of cross-examining him, a

(a) 19 Ves. 554.

(b) Vol. II. pa. 123.

(c) 2 Ch. Ca. 68, 79.

(d) 1 Vern. 369.

(e) 1 P. Wms. 146. Dick.

21. 2 Salk. 512. 2 Madd.

79. Peake Ec. 11.

Note in Writing is delivered to the adverse Solicitor; the Commissioners then call the Witness before them, and direct all other Persons to withdraw from the Room during the Examination, leaving the Commissioners their sworn Clerks and the Witness, to themselves; and if a Person named a Commissioner refuses to qualify, he must not be suffered to be present (a). One of the Commissioners taking the Interrogatories, and producing them to the Witness, reads the Title of them to him, and administers the following Form of Oath, the Witness laying his right Hand on the Bible or New Testament.

You shall true answer make to all such Questions as shall be asked of you on these Interrogatories, without Favour or Affection to either Party, and therein you shall speak the Truth, the whole Truth, and nothing but the Truth.

So help you God !

The Form of Oath may be varied as the Case requires, and the Substance turned into an Affirmation, for a professed Quaker, thus :

You shall solemnly, sincerely, and truly declare and affirm (b) to all such Questions, &c.

When a Witness has been examined upon the Interrogatories of the Party producing him, if he is to be cross-examined, he ought not to be suffered to go at large, until the latter Examination has taken place.

The Witness being sworn, his Name, Description, Addition, and Age are written down on the same Paper, under the Title of the Depositions, and the Deposition or Answer to each Interrogatory distinctly taken down in Writing by the Clerks, thus :

(a) 15 Ves. 380.

(b) 8 Geo. c. 6.

**Depositions of Witnesses produced, sworn, and
examined, &c.**

*Peter Brooke, of Mere, in the Parish of Rostherne,
in the County Palatine of Chester, Esq., aged forty
Years and upwards, a Witness produced, &c.*

*To the first Interrogatory, this Deponent saith, &c.
See Title, 'Depositions' (a).*

The Deposition of each Witness should be carefully read over to him, or he should be permitted to peruse and consider what he has sworn, so that the Sense of the Witness may be taken *ex re nata*, that if upon Revision, any Errors appear, or upon Recollection, the Witness objects to the penning of the Statement of the Deposition, it may be rectified (b). It seems that Commissioners are not bound to examine each Witness upon all the Interrogatories, they are not bound to divest themselves entirely of all Discretion, as to what is and what is not legal Evidence (c), nor to judge what Interrogatories are impertinent and what not, but to examine upon the Interrogatories as they find them, according to their Commission. If a Witness demurs, or objects to being examined, the Commissioners must return the Demurrer, (though not an appropriate Term, being as Lord Eldon says, nothing more than a Tender of Reasons for not answering the Question) (d) with the Commission (e): Such Demurrers are set down in the Paper like other Demurrers (f), and come on to be argued before the Court, and pay the same Costs if overruled, but held to very strict rules (g); and the Facts upon which a Demurrer is founded must be verified by Affidavit, if they do not appear on the Face of the Interrogatory (h): a Witness may object to

(a) Vol. 2. pa. 123.

(b) Prac. Reg. 90, 91.

(c) 13 Ves. 515.

(d) 2 Swanst. 202.

(e) 1 Madd. Rep. 265.

(f) Mos. 195. 228. 3

Madd. 121. 123.

(g) 2 Atk. 523. 2 Swanst.

195. 216.

(h) Mos. 230. 1 Madd. 123.

answer Questions which have a direct Tendency to criminate, or render him liable to Penalties (a).

If the Commission be adjourned to another Day and Place, and Witnesses are examined, a Memorandum or Entry of such Adjournment should be made, which the acting Commissioners must sign, and the Time and Place where such Examinations were taken ought to be mentioned and set forth in the Title of the respective Depositions.

The Witnesses must subscribe their Christian and Surnames, or Marks, to the paper Drafts of their several Depositions; after which the whole are ingrossed by the Clerks upon Parchment, and each Witness sets his Name to his own Deposition, and the acting Commissioners also subscribe their Names to each Skin of Parchment.

Books, Deeds, Vouchers, and other documentary Evidence are produced and proved at the Execution of the Commission, or enforced by *Subpœna duces tecum*. After a Deed, &c. has been produced, it becomes an Exhibit, and a Certificate to the following effect is indorsed thereon, and signed by two of the Commissioners as follows:

In Chancery. Between Peter Brooke, Esq. Plaintiff,
and
George Delves, Esq. Defendant.

16th July, 1824, at the Execution of a Commission for the Examination of Witnesses in this Cause, this Paper (or Parchment Writing) was produced and shewn to Thomas Dutton, a Witness sworn and examined, and by him deposed unto at the Time of his Examination, on the Complainant's behalf (and was also produced and shewn to, &c. If two Witnesses are examined. A Witness, &c.) before us

Ralph Leycester.
George Bostock.

The Depositions ingrossed upon Parchment, must be carefully examined and compared with the Paper Draft of the Depositions, which are usually sealed up, and one Part of them delivered to one of the Plaintiff's Commissioners, and the other Part to one of the Defendant's Commissioners, to be closely kept until Publication passes in the Cause: two, but more frequently all the acting Commissioners subscribe their Names to each Skin of Parchment containing the Depositions and also the Interrogatories, which being annexed to the Commission, with the Schedule of Oaths, a Return is then made to the Commission by two or more of the acting Commissioners, by indorsing on the Back of the Commission, about the middle, and subscribing their Names, thus:

The Execution of this Commission appears in a certain Schedule (or Schedules, if more than one) hereunto annexed.

Ralph Leycester.
George Bostock.

The Commission, with the Oath, Interrogatories and Depositions annexed, must be closely folded up, so that no Part of the Inclosure can be read, and bound together with red Tape, at the Crossing of which the Commissioners set their Seals, and direct it to the Clerk in Court at the Six Clerks' Office, in Chancery-lane, who made out the Commission for the Party. The Commission thus sealed up, may be brought up to Town, and delivered by one of the acting Commissioners into the Hands either of the Clerk in Court making out the Commission, or of his Writing Clerk, in the Six Clerks' Office, without Oath of the safe Custody, and an Indorsement of the Receipt from the Commissioner is written thereon: or delivered by one of the acting Commissioners into the Hands of a careful Person, to be carried to the Clerk in Court, who when the Commission arrives, will take the Bearer with the Commission to the Master at the Public-Office, or in

his Absence, to some other Master before whom the Bearer must make Oath, "*that he received the Commission from the Hands of one of the Commissioners therein named, and that it has not been opened or altered since he so received it;*" of which an Indorsement is made thereon, as follows:—" *The 8th of November, 1824, upon the Oath of Edward Wilbraham, before S. Cox.*" The Clerk in Court then takes the Commission from the Public-Office, and carries it to his Seat in the Six Clerks' Office, where it remains unopened until Publication passes in the Cause: or in the Absence of the Clerk in Court, the Bearer may leave the Commission at the Public-Office, in Southampton Buildings, and be sworn before the Master there as to the safe Custody. A Fee of five Shillings is always allowed to the Person bringing up the Commission; or if the Distance be considerable, the reasonable Expences actually paid.

The Expences of entertaining the Commissioners and Clerks at the Place where the Commission is held, are borne equally by the Parties attending and joining, but of the Witnesses, by the Party producing them; and if the Expences of keeping open the Commission are very disproportionate, they are paid by the Party by whom they were occasioned, and so of cross-examining the Witnesses, by the Party needlessly detaining them.

If a Foreign Witness is unacquainted with the English Language, an Order must be obtained by Motion of course, or by Petition to the Master of the Rolls, appointing an Interpreter, who is sworn by the Commissioners to interpret truly the Oath to the Witness, and also the Depositions of the Witness, which are taken down in English (a); or if the Depositions are taken down in the Language of the Witness, a like Order must be obtained for a sworn Translation into English, which when sworn to is annexed to the Record of the original Deposition, and filed therewith, and an Office-Copy made, which by Order is admitted to be

(a) Diok. 104. 4 Bro. C. C. 90. 2 Cox, 288.

read at the Hearing ; but the Record will not be allowed to be taken out of the Six Clerks' Office, for the Purpose of Translation (a).

The Plaintiff having regularly the suing out and carriage of the Commission, is to appoint the Time and Place for carrying it into Effect ; but if the Defendant apprehends that the Plaintiff will make Delay in such Appointment, he may apply for an Order for a *Duplicate of the Commission* ; and so if the Plaintiff or his Commissioners abuse the Carriage of the Commission by making unnecessary Adjournments, or an irregular Examination of Witnesses, that may intitle the Defendant to a Commission of his own, and to the Carriage of it. When due Notice of executing the Commission is given, and at the Day appointed the Commission is opened, and nothing done, and no Adjournment made, the Commission is lost, unless the other Side will agree to adjourn, or to accept fresh Notice ; but if the Commission be not opened, and fresh Notice is given, and then the Commission is executed ; this is a regular execution of the Commission : where only one Commissioner on each Side meets, and the Plaintiff's Commissioner having the Carriage, refuses to act, the Court will visit the Costs upon the Plaintiff, and renew the Commission at his Expense (b) ; or allow the Defendant to sue out a new Commission and give him the Carriage of it ; and so when a Commission is lost through the Default of him who has the Carriage of it (c), or if due Notice be given, and one Side proceeds and examines, and the other Side does not, but prays a new Commission, if it be granted he shall bear all the Charges of such renewed Commission in Court, and in the Country, as well for the Charge and Entertainment of the Commissioners on the other Side as of his own, and the former shall be permitted to cross-examine the Witnesses

(a) 7 Ves. 292.

(c) 3 Prax. Alm. 62.

(b) Ord. Canc. Bea. Ed. 72.

produced by him that renews the Commission, but if the adverse Party examine any Witnesses of his own, then he shall bear his own Part of the Charge, because he has equal benefit by the Examination of his own Witnesses, the Charges of the Commission to be upon ascertained reference to the Master, by the Oath of the Party, or of him who disbursed the Money, but he at whose instance a Commission to examine after a former Commission executed and returned is renewed, and he by whose default, or of his Commissioners, a former Commission was not executed, and is therefore renewed, must at his peril examine all his Witnesses upon such Commission, or in Court, by the End of the Term wherein that renewed Commission is returnable (a).

If the Commissioners on both Sides attend the Execution of the Commission, and the one examines, and the other neither examines nor exhibits Interrogatories, he shall not afterwards examine, but by special Order (b), and the like when Defendant joins in Commission, and his Commissioners do not attend, or if Notice be given, and one Side examines, and the other Side does not, no new Commission will be issued, unless the Default be accounted for, and upon the usual Affidavit of not having seen or heard the Contents of the Depositions on the other Side: where Witnesses have been suspected to be interested in the Suit, a Defendant has been allowed after examination and before publication, to examine Witness by Commission, as to the Fact of Interest (c).

Depositions taken before Commissioners, one of whom is the Solicitor, or Clerk to the Solicitor of either Plaintiff or Defendant, or if the Clerk to the Commissioners is also Clerk to the Solicitor for either Party, will be suppressed (d).

In treating of the Defence to Suits, a *Cross-Bill* may be

(a) Ord. Cano. Bea. Ed. 72.
191.

(b) 1 Ch. Ca. 274.

(c) 2 Madd. Rep. 322.

(d) Dick. 563, 793. 15 Ves.
380, 4 Madd. 380.

considered as a Means of Defence frequently resorted to (a); by allowing a Party in that Shape to state his own Case more to his advantage than he could by Answer (b). And by compelling from the Plaintiff in the original Suit, a Discovery of Facts resting in his own Knowledge, which may constitute, or greatly assist in a Defence to the first Suit, where by the Rules of Pleading in Equity, the Defendant might not be able to avail himself of the Matter of Defence in any other Shape (c); a Cross-Bill may also be necessary to obtain a Complete Determination of a Matter already in Litigation in the Court; as, where a Question arises between Co-Defendants in the original Cause, whose Interests are opposed to each other, so that a complete Decree cannot be made; some of the Defendants must file a Cross-Bill against the Plaintiff, and the other Defendants to bring the litigated Point before the Court, and sometimes the Court directs a Cross-Bill to be filed (d); or it may be brought to have an Agreement delivered up or cancelled, which it is the Object of a Bill to have specifically performed (e); and it is sometimes filed to serve the Purposes of a *puis darrein Continuance* at Law, thus where after Issue joined, an Award has been made, or a Release obtained, or a Certificate by a Defendant's Bankruptcy (f), not being in issue, the Fact cannot be proved *vivâ voce*, or sent to law, but it may be put in issue by a Cross-Bill (g); but it should seem that a Party cannot by a Cross-Bill question what is admitted by the Answer to the original Bill (h); neither can an Answer to a Cross-Bill be used as Part of the Answer to the original Bill, but having obtained the requisite Discovery, the Defendant should move for Leave to file a Supplemental Answer(i).

(a) 3 Atk. 812. Mos. 382.

(b) Red. Tr. Ch. 64.

(c) Coop. Pl. 86.

(d) Red. Tr. Ch. 65. 2 Ch.

Ca. 248. 3 Atk. 110.

(e) 1 Sim. and Stu. 190.

(f) 4 East. 413. 2 Smith.

Rep. 659. 9 East. 82.

(g) Red. Tr. Ch. 64.

(h) 2 Ves. 537.

(i) 2 Ves. and Bea. 16.

Bills of this Description must be filed before Publication has passed in the original Cause, unless the Plaintiff in the Cross Bill is content to go to a Hearing upon the Depositions already published, or where the Bill is filed by the direction of the Court (*a*); but Publication may be enlarged on special Application (*b*). Evidence taken in the Cross-Cause relating to Matters in Issue in the original Cause, is not allowed to be read after a Decree in that Cause, but such as does not relate to Matters in Issue in the original Cause has been received (*c*); and where no Witnesses are examined in the original Cause, Depositions to the same Matters put in Issue by that Cause, may be read at the Hearing of the Cross-Cause (*d*): where the original Cause is brought on and heard before the Cross-Cause, if the Cross-Bill was filed previously, the Decree in the original Cause may be varied by the Decree made in the Cross-Cause (*e*); but the original Cause will not be delayed by the Cross-Bill, unless upon special Cause shewn, but if a Decree is made in the original Suit, the Plaintiff in the Cross-Bill may by caveat stop the Inrolment of the Decree, and then Petition to re-hear the original Cause, and bring on both together (*f*).

Here we should remark, that the Plaintiff in the original Cause, has a Right to the first Answer, and may Apply to stay Proceedings in the Cross-Cause, till an Answer comes in, and the obtaining Orders for Time to answer the Cross-Bill, does not waive the Right, though the Plaintiff in the Cross-Cause may be in a Situation to enforce an Answer in that Cause (*g*); usually an original Bill and Cross Bill proceed to a Hearing together, and if an Abatement takes place, previous to a Decree there must be a Bill of revivor

(*a*) 3 Atk. 110. Coop. Pl.
82. 1 Eq. Ca. Abr. 70.

(*b*) 2 Ves. 336.

(*c*) 3 Atk. 502. Ambl. 293.

(*d*) 3 Atk. 502.

VOL. I.

(*e*) Vin. Abr. Tit. Decree,
c. 16.

(*f*) 2 Ves. 577.

(*g*) 1 Turn. Rep. 165.

in each Cause, but after a Decree, one Bill will revive both (a); if an original Suit abates, and a Cross-Bill is filed, before it is revived, the priority of Suit is lost (b); so where the Plaintiff in the original Bill amends, after the Cross-Bill filed, the Cross-Bill takes precedence (c).

A Cross-Bill usually states the original Bill, the Proceedings under it, and the Rights of the Plaintiff necessary to be made the Subject of Cross-Litigation, on the Ground of resisting the Claims of the original Bill; and it in all Respects partakes so much of the Formalities of an original Bill, that a Reference to that Head in a former Part of this Work, will answer every Purpose.

Publication having passed in the Cause by Rule or Order, the Solicitor must apply for Office Copies of the Depositions of the Witnesses examined in Town, at the Examiner's Office in the Rolls Yard; and of those Witnesses examined by Commission in the Country or abroad, to his Clerk in Court in the Six Clerks' Office, and before he takes them away, he should be satisfied that they have been examined with the Records, and properly authenticated; and in this Stage, he will have an Opportunity of looking into the Interrogatories on the other Side, and of examining into the Purity of the Proceedings, and if the Interrogatories should be leading, or if any Scandal or Impertinence be found, he should take the proper Course to suppress the Depositions, and to expunge the repudiated Matter: and any Irregularity in the Examination of the Witnesses, should at this Period be enquired into: where the Interval between the Publication and the Hearing of the Cause is short, the Court will, upon Application, give Time to examine, whether the Depositions were regularly taken; it being held to be too late to object for Irregularity at the Hearing (d).

(a) Prac. Reg. Wy. Ed.
88.

(b) Dick. 260.

(c) 2 P. Wms. 435. 2 Atk.
218. 2 Cox. 371.

(d) 1 Swanst. 171. 1 Wils.
C. C. 155.

The Defendant's Solicitor after Service of the Subpoena to hear Judgment, should search at the Register's Office, the Book of Causes set down for hearing in Court or at the Rolls, to inform himself how far off the Cause stands, and to detect any Irregularity in setting it down. Where an Insolvent Court Attorney set down a Cause for hearing, and served a Subpoena to hear Judgment, before Publication had passed, the Subpoena was ordered to be quashed, and the Cause struck out of the Paper, and the Court visited the Attorney with the Costs of the Application (a). It should be observed, that a Cause cannot regularly be set down before Publication, though it may by special Order, and is sometimes done when Publication is enlarged at the Instance of the Defendant, but so as not to hinder the Plaintiff from setting down the Cause; but Publication is enlarged of Course where no Witnesses are examined (b).

If a *general or special Retainer* has been given by Defendant to Counsel, a Brief of the Pleadings and Depositions, with well-digested and appropriate Observations upon the Points raised by the Pleadings, with all the Bearings and References to the Matter in Question, should be prepared and delivered in sufficient Time to make himself Master of the Facts; with regard to Retainers generally, here we should remark the Observations of Lord Eldon; that if a Retainer be given by a Party against whom the Counsel has been employed in a Cause between the same Parties, the Counsel before accepting it, sends to his former Client, stating the Circumstance, and giving him the Option; but his Lordship goes on further to observe, that it ought not to be accepted if the Counsel knows any thing that may be prejudicial to the former Client, *though he refuses to retain him* (c); and more recently, that if a Counsel has a Retainer from one Party, and no Brief, that if he takes a Retainer and Brief from the

(a) 4 Madd. 126.

(c) 19 Ves. 274.

(b) 6 Madd. 50.

other Side, it would be regular, giving previous Notice to the Party who first retained him, but that it might be a Question whether Notice must of Necessity be given, though generally so understood (*a*). To prevent useless and heavy refreshing Fees, where the Cause does not come on in the Term in which the Briefs are delivered, the Solicitor should attentively watch the Progress made, and a sufficient Time before the Cause is expected to be in the Paper of the Day, he should deliver the Briefs to Counsel to attend the Hearing, with Fees commensurate with the Difficulties of the Case. The Instructions in a former Part will be sufficient for all the Requisites preparatory to the Hearing (*b*); but where there is a well-grounded Apprehension that the Plaintiff if he has set down the Cause, will not appear on the Hearing, an Affidavit that a Subpoena to hear Judgment has been served upon the Defendant must be made and filed, and an Office-Copy taken; and if the Plaintiff does not appear, upon reading the Affidavit of Service, the Bill will be dismissed with Costs (*c*); without such Affidavit, the Cause would be merely struck out of the Paper (*d*), with the Costs of the Day; which by very ancient Practice is a liquidated Sum of 5*l.* in Court, and 3*l.* 6*s.* 8*d.* at the Rolls; and the Cause restored; but a Solicitor has been ordered to pay not merely the Costs of the Day, but all the Costs occasioned by his refusing to appear at the Hearing, pursuant to an Undertaking in Writing, with the Costs of the Application (*e*).

The Instructions before given (*f*), preparatory to the Hearing on the Part of the Plaintiff, may convey some useful Admonition to a junior Practiser for the like Purpose; to which may be subjoined, that if the Bill has been dis-

(*a*) *Ex parte Lloyd in re Glover.* 5 *Ves.* 1822. MSS.

(*b*) *Ant. pa.* 303.

(*c*) 17 *Ves.* 130.

(*d*) 5 *Madd.* 21.

(*e*) 16 *Ves.* 133.

(*f*) *Ant. pa.* 305.

missed and restored upon Payment of Costs, an Objection that these Costs remain unpaid, will come too late at the Hearing (a); and, as a general Rule, if upon the Hearing it appears that the Bill is brought for a Sum beneath the *Dignity of the Court*, viz. under the Sum of 10l. or 40s. per Annum in Land, and the Defendant has neglected to avail himself of objecting by Demurrer, on a summary Application by Motion, the Bill may at the Hearing be dismissed with Costs (b); the Exceptions to this Rule are Charities (c), Fraud (d), or a disputed Right, as in the Instance of a Claim of 6s. for Easter Offerings (e).

As connected with the Hearing, it should be observed, that Matters arising out of *Family Disputes*, are disposed of by the Lord Chancellor, *in his private Room*, upon the Application, and with the Consent of all Parties. This Course Lord Eldon has declared to have been the uniform Practice as long as the Court has existed, and that what is so done, is not the Act of the Judge, but of the Parties themselves, in Family Feuds (f).

The Solicitor must attend the Hearing, and appear by Counsel, or in Default a *Decree nisi* would be pronounced, the Consequences of which we have explained in the preceding Pages (g).

The Cause being heard, and a Decree pronounced, the Court Fees for all the Defendants, whether they appear by one or more Solicitors, by *Lord Hardwicke's Orders*, were 10s., but a continued Practice has been held to annul a written Order (h), and the Fees at present are 13s. for each Defendant employing a separate Solicitor. The Plaintiff's Solicitor usually draws up the Minutes of the Decree, especially if it be in his Favour, of which the Defendant's

(a) *Lorimer v. Lorimer*,
Mistaken, 1823, MSS.

(b) 2 Atk. 253. 2 Gwill.
549. Finch. 253.

(c) 1 Eq. Ca. Abr. 75. m.

(d) Bunb. 17.

(e) 4 Bro. P. C. 314.

(f) Coop. 106.

(g) Ant. pa. 310.

(h) 1 Vea. and Bea. 327.

Solicitor bespeaks a Copy; but if any improper Delay or Neglect is incurred, the Defendant's Solicitor may draw up the Minutes, and pass and enter the Decree, for which Purpose he must leave his leading Counsel's Brief, with a Deposit of three or four Guineas with the Register, and the usual Course of passing and entering Decrees in adverse Cases must be followed, for which Instructions will be found in a former Part of this Work (*a*). In amicable Suits, the Plaintiff's Solicitor bespeaks the Minutes taken down by the Register, and Defendant's Solicitor a Copy; if any Difficulty arises, an Appointment is made with the Register; and upon an Attendance of the Solicitor for each Party, the Minutes are settled: if an Application to the Court should be necessary, the Course to be pursued has been already explained (*b*). When the Minutes have been finally settled, the Plaintiff's Solicitor leaves Instructions with the Register to draw up the Decree, of which if the Defendant's Solicitor takes a Copy, he then makes an Appointment with the Register for passing the Decree, and gives Notice in Writing to the Defendants, and all other Solicitors who have taken and paid for Office-Copies: the Defendant's Solicitor should carefully peruse his Office-Copy, to see that his Client's Interest has been properly taken care of. The Solicitors for the Plaintiffs and Defendants attend the Register, and if any immaterial Alteration or Variation as of course, should be required, it may be made by Consent: after the Decree has been passed and entered, Applications to rectify the Decree must be by Petition (*c*); the Register will then pass the Decree, and the Defendant's Solicitor should examine his Office-Copy with the original Decree, and prevail upon the Register to sign it; but unless the Decree is entered, or left with the Entering Clerks, the Register will not in all Cases sign the Office-Copy: before the Entry is made it should not escape the Attention of the junior Practiser, that an Office-

(*a*) Ant, pa. 320.

(*c*) 4 Madd. 464.

(*b*) Ant, pa. 317.

Copy unsigned is not accredited at the Accountant General's Office, nor in Strictness acted upon at any of the other Offices, though marked *Examined* by the Proper Clerk at the Register-Office.

It may be useful here to observe, that in Contentions between Creditors and Executors, where separate Bills have been filed to take the Executor's Accounts, the Proceedings in one of the Suits will, under Circumstances, be stayed, and the Prosecution of the Decree in the other Suit, given to the Plaintiff in the first; and if the Solicitor in either of the Causes is retained on both Sides, that has been held a strong auxiliary Reason for taking that Suit out of his Hands (*a*). Where, for Instance, pending a Suit by Creditors, a Bill was filed by the Executors on the 15th of December, and a Decree by Consent made on the 22d following, and the same Solicitor retained for all Parties in the latter Suit, the Prosecution of it was given to the Creditors (*b*).

The Decree being passed and entered, it is incumbent on the Plaintiff's Solicitor to proceed before the Master upon the Enquiries and Directions in the Decree. The Defendant's Solicitor will be informed of these Proceedings by Warrants served on his Clerk in Court, and sent to him: the first Proceedings usually taken by the Plaintiff, which requires the Defendant's Attention: in a Suit for taking Executor's Accounts are the several Warrants on leaving, and to settle the Interrogatories left for the Examination of Defendants the Executors, an Office-Copy of which Defendant's Solicitor must apply for to the Master's Office: there is usually a standing Form in most Offices (*c*). If the Interrogatories should appear to be improper, the Course of Proceeding has been pointed out (*d*); but if they are of the ordinary Cast and not objectionable, when the Defendant's Solicitor attends the Warrant to settle, the Master will allow

(*a*) 5 Madd. 17.

(*b*) Ibid.

(*c*) Ant. pa. 334.

(*d*) Ant. pa. 339.

the Interrogatories, and the Plaintiff's Solicitor will take and File the Master's Certificate of Allowance, and usually a Time is then appointed for Defendant to put in an Answer, or as it is termed, *an Examination*. Addressed to a Junior Practiser, it may be wholesome to apprise him in this early Stage of a Rule of general Application, prevailing in all the Offices, *that no Solicitor is entitled to Fees for attending on any Proceeding before the Master, without having taken an Office Copy of such Proceeding (a)*.

An Examination partakes so much of the Nature of an Answer to a Bill, that the Instructions in the preceding Pages, for preparing and framing an Answer will be sufficient for the general Purposes of preparing an Examination to Interrogatories in the Master's Office (b) ; as applicable to the Latter, it may be useful to observe, that in stating Accounts, if a Defendant has set forth in the Schedules all the Receipts and Payments down to the Time of filing his Answer, he must in his Examination state only the subsequent Receipts and Payments, and carry on the Account from the Foot of his Answer, to the Time of putting in his Examination ; for although the Interrogatories extend to a wide-sweeping Inquiry into all Receipts and Payments, a Repetition of those comprised in the Schedule to the Answer, might subject the Examination to a Reference for Impertinence (b) ; so on the other Hand, a defective Account to a Reference for insufficiency, and if for the Purposes of spleen, it runs into Scandal, it might be referred and expunged ; an Examination is subject to all the Infirmities of an Answer: the Admissions should be so framed that the Receipt and Application should form one Transaction and not distinct Matters, and should be *uno flatu*, otherwise the Admission would be Evidence of the Receipt, and the Application must be proved by Evidence. The Ex-

(a) Com. Rep. on Fees 15.

(c) 3 Madd. 246.

(b) Ant. 139.

amination being put in upon Oath, in all Cases, and more especially in adverse Suits, the utmost Care and Attention is required; it would be prudent in long and intricate Dealings and Transactions to call in the Assistance of an Accountant, and upon the general Tenor and Purport to advise with Counsel, but the Signature of Counsel to an Examination, Lord Eldon has decided to be unnecessary (*a*); the Frame and Formulæ of an Examination will be found in another Part of this Work (*b*); the Examination must be ingrossed on Parchment in Words at length, and the Account by Schedules in Figures; when it has been correctly examined, the Defendant must sign the Ingrossment, and attend at the Master's Office, to whom the Cause is referred to be sworn to the Examination, for which 1s. is paid for the Oath, and a Fee of 5s. to the Clerk; a Warrant upon leaving must be taken out and served upon the Clerks in Court for all the Parties underwritten, "*the Defendants the Executors have left their Examination;*" if the Defendants reside in the Country, above twenty Miles from London, the Examination may be taken by Commission, for which Instructions have been already given (*c*); and the Office-Copies of the Examination must be obtained from the Clerk in Court, and by a Decision of Lord Eldon, the Clerk in Court of a Co-Defendant is intitled to make Office Copies of another Defendant's Examination (*d*); if the Plaintiff takes out a Warrant to bring in the Examination, the Defendant's Solicitor must attend and request further Time to prepare the Examination, which the Master will allow according to the Exigencies of the Inquiry, or an Order for further Time may be obtained as of course, by Motion or Petition to the Master of the Rolls; and under Circumstances upon Notice, further Time may be obtained, and in all Cases the Order must be drawn up, passed, and entered, and served upon the several Clerks in

(*a*) 18 Ves. 287.

(*b*) Vol. 2, pa. 131.

(*c*) Ant. pa. 341.

(*d*) 3 Ves. and Bea. 176.

Court; if a Defendant should ultimately neglect to put in his Examination, the Plaintiff may resort to the compulsory Proceedings in the former Part of this Work (a).

If upon Perusal of the Examination, the Interrogatories are fully answered, and the Plaintiff's Solicitor is satisfied with the Examination, he will accept it, as sufficient, and proceed in the Cause, but if he should think it insufficient, he will obtain as of Course an Order of Reference to a Master to look into the Interrogatories and Examination, and certify whether the latter be sufficient or not, and he will carry that Order into Effect by such Proceedings as have been before treated of (b); and if the Result of the Reference should be against the sufficiency of the Examination, a further and full Examination must be put in.

If the Plaintiffs' Solicitor should conceive it necessary to have all the Books and Papers, which relate to the Matters in Question in the Cause, brought in before the Master, and should take out a Warrant for that Purpose, the Books and Papers required must be scheduled, and deposited in a Box, with a Lock and Key; on which should be written the Name of the Cause, and what it contains, as follows: "*A. against B. the Defendant B.'s Box, or the Defendant B.'s Books and Papers,*" &c. &c. An Affidavit must be made by the Defendant, stating the Books and Papers then left in a Schedule to his Affidavit, and that they are all the Books and Papers in his Custody or Power, or that he ever had, relating to the Matters in Question in the Cause (c). This Affidavit should be sworn before the Master at his Chambers; or if the Defendant is in the Country, before a Master Extra, and transmitted to the Solicitor in Town, to be left with the Box, &c. at the Master's Chambers; a Warrant must be then taken out on leaving *the Defendant's Books and Papers, Deeds and Writings*, which is not to be served on the Plaintiffs'

(a) Ant. pa. 340.

(b) Ant. pa. 343.

(c) Ant. pa. 347.

Clerk in Court: If a Warrant to inspect them is taken out, without which no Inspection can be had, the Defendant's Solicitor should attend to give the requisite Explanation. the Master's Clerk is intitled to a Fee of six Shillings and eight-Pence for comparing them with the Schedule.

The Plaintiff after a full Examination has come in, will prepare a *Charge upon the Executors* of the personal Estate, comprising all the Sums admitted by their Answer and Examination to have been received by them, and such other Part as he can prove to have come to their Hands by Evidence *aliunde*, and also Interest upon such Balances as remain in the Hands of the Executors (a); this Charge he will bring into the Master's Office, and take out and serve the usual Warrants on leaving and to proceed, the Defendant's Solicitor must take Office Copies of the Charge, and attend the Master upon the Plaintiff's Warrants to proceed; the Charge will be supported by reading out of the Defendant's Answer and Examination, Admissions of the several Items charged, and by such other Evidence as the Plaintiff's can produce (b); and the Defendant's Solicitor must be prepared to state to the Master whatever Objections he may have against the Allowance of any Item charged: when the Charge has been gone through and allowed by the Master, by setting his Initials at the Foot, the Plaintiff's Solicitor takes out and serves a Warrant for the Defendants to bring in their Discharge; after the Service of three Warrants, if the Defendants neglect or refuse to bring in their Discharge, they will stand charged in Account with the whole Sum allowed, but the Master will give them a reasonable Time to prepare the Discharge, and the Defendant's Solicitor must take out a Warrant for that Purpose, which he must serve upon the Clerks in Court, for all the Parties interested in taking the Account, and he must attend and state a Reason for extending the Time; the Discharge should be brought in before the Report is

(a) 6 Ves. 620. 7 Ves. 124. (b) Ant. 359.

11 Ves. 581.

settled, but as a Creditor has been allowed to come in and prove his Debt, even after the Assets have been apportioned and transferred (a); the Court, upon Application, would make a like Order for an Executor to bring in his Discharge before the Report is signed.

The Discharge must embrace every Sum paid, laid out, or expended by the Defendants in their Character of Executors, with the Dates and Times when and to whom, and for what Purpose paid, or applied, (similar to an Inventory in the Ecclesiastical Court,) and also every other Claim the Executors have upon the personal Estate; the Order in which Assets are administered, as laid down in a Work of distinguished Merit, has been before treated of (b); the Discharge must be drawn up in proper Form (c), fair copied and left at the Master's Office, and the usual Warrants taken out, "*on leaving the Defendant's the Executor's Discharge,*" and subsequently, "*to proceed on Defendant's Discharge,*" served on the respective Clerks in Court. To support the Discharge, the Defendant must produce before the Master Receipts and Vouchers upon proper Stamps for all Payments exceeding forty Shillings, but the production of Vouchers impounded in the Ecclesiastical Court have been dispensed with by Order, and supplied by Affidavit (d); by the Course of the Court, the Defendant is allowed by his Answer or Examination to discharge himself upon his own Oath, in respect of Sums under 40s., (e), so *ut videtur* as the whole do not amount to more than 100l. (f), but he must swear *positively* to the Fact, and not to Belief (g); Receipts for Land Tax, Chief Rent, and Payments of the like Nature must be produced, and generally the Master sets his Initials to all Vouchers to prevent their being allowed twice over: in general Practice

(a) 1 Madd. Rep. 529.

(b) Ant. pa. 356.

(c) Vol. 2, Tit. Discharge.

(d) 8 Ves. 116.

(e) 2 Ch. Rep. 249. 2 Vern.

176. 7 Ves. 404.

(f) 1 Vern. 170.

(g) 2 Atk. 410.

an Answer, Examination, or Affidavit is not allowed in proof of Sums above 40s., but *sub modo* it is received; where the Application of a Sum is coupled with the Admission; if he says on such a Day he received a particular Sum and immediately handed it over, the Whole must be taken together, but not if the Admission stands separate and distinct from the Application; the Master cannot enter into Evidence in explanation, being Evidence to contradict the Answer (a); where the Master has not allowed in the Discharge, Payments made by the Executor for want of Evidence, which by additional Evidence could be clearly proved, but the Master refuses to admit a distinct Motion should be made, that the Master should be ordered to receive the Evidence: and not to except to the Report (b); the Master may by his Report, state the Reason why he has disallowed a Claim, though there is no Direction in the Decree, to state special Matter (c). A Trustee and Executor is intitled to all reasonable Expences incurred in the Execution of the Trust, and requires no Order for that Purpose; but the general Rule is that a Trustee is not intitled to Claim any Compensation for personal Trouble and Loss of Time: if it be such as not to be undertaken without Compensation, a special Case must be made for the Court, before the Trust is accepted (d); nor can a Trustee denude himself of that Character, till he has performed the Trust (e): in the Courts of Law, Executors having Assets, are liable to Funeral Expenses, although they have given no Orders respecting the Funeral (f); and the Vice-Chancellor has expressed a Doubt as to a Husband having a Right to throw a Wife's Funeral Expences on her separate Estate (g); Payments for Mourning Rings, though not directed by the Will, have been allowed under the Dis-

(a) 7 Ves. 404, 587. 19
Ves. 583.

(b) 3 Madd. 43.

(c) 4 Madd. 209.

(d) 5 Madd. 90.

(e) 1 Ja. and Wa. 68.

(f) 3 Campb. 298.

(g) 6 Madd. 90.

cretion given to Executors (a): after a Suit for an Account of Assets, the Executor has not been allowed Payments *voluntarily* made without Suit (b); and it seems that a Judgment confessed pending a Suit will not be allowed in an Account of Assets, nor after a final Decree (c): though the Executors would be admitted to stand in the Place of the Creditors so paid (d).

If there are any queried Items in the Discharge, they must be disposed of, and the Master should be requested to set his Initials at the Foot of the Discharge when it is gone through and allowed. A Co-Defendant if interested in taking the Account against the Executor, may be allowed to attend the Master in taking the Account (e), any Delay or Neglect would authorize either Party to take out Warrants and proceed.

The Defendant the Mortgagee, must prepare a Claim for Principal and Interest due upon his Security, which in the usual Form (f), must be fair copied and left with the Master, and Warrants on leaving and to proceed, taken out and served upon the respective Clerks in Court; the Mortgage Deeds and the Evidence taken in the Cause will be sufficient upon the Attendance to support the Claim of Debt; and Evidence in the Cause, though not read at the Hearing, may be received by the Master (g); if any Dispute arises, a state of Facts should be brought in by the Mortgagee (h); Warrants taken out on leaving, and successive Warrants to proceed and allow the Claim; the Mortgagee may examine Witnesses in support of his State of Facts, and the other Side may cross-examine, but they are not allowed to examine Witnesses in chief, to disprove his State of Facts (i).

(a) 14 Ves. 364.

(b) 1 Vern. 369. Pre. Ch.
79, 188.

(c) 1 Vern. 457. 10 Ves. 34.

(d) 2 Ves. j. 518.

(e) 16 Ves. 49.

(f) Vol. 2, Tit. Charge.

(g) 11 Ves. 564.

(h) Vol. 2, pa. 416.

(i) 19 Ves 596.

As connected with this Head, it remains to subjoin that if the Mortgagee has entered into Possession of the Estate mortgaged, and by his own Act has made himself accountable for what he receives in Discharge of his Principal and Interest, *Annual Rents* will be directed (*a*); but such Direction is not of course; under special Circumstances, it is ordered, and where directed, it is never for a broken Period but from the Beginning; nor where the Interest is in Arrear when the Possession is taken (*b*); in the Course of the general Practice, the Master cannot make Rents unless specially directed by the Decree (*c*), but if the gross Sum received, exceeds the Interest, in taking the Account, it must be applied to sink the Principal (*d*); and if the Mortgagee in Possession holds over after Payment of his Principal and Interest, he will be considered as a bare Trustee, and be charged with the Balance and Interest from the Demand made, or filing the Bill (*e*); if the Mortgagor is suffered to remain in Possession, he is not liable to account for the Rents, though the Security is insufficient (*f*); a Mortgagee will be allowed in his Account *necessary Repairs*, but he is under no Obligation to lay out Money beyond those (*g*); nor strictly even to leave the Premises in as good Condition as he found them (*h*); and if the Title is impeached, and he is put to Expense in supporting the Right of the Mortgagee to the Estate, he may add it to the Principal, and it will carry Interest, at the same Rate as the Principal Money lent (*i*), so for Renewal Fines of Leasehold Premises he may re-imburse himself out of the Estate (*k*); but if the

(*a*) 2 Atk. 410, 534.

(*f*) 3 Atk. 244. 2 Ves.

(*b*) 4 Madd. 254. Coop.

and Bea. 252. 3 Ves. 25.

238. 19 Ves. 383.

(*g*) 3 Atk 518.

(*c*) 1 Madd. Rep. 13.

(*h*) 1 Anst. 96.

(*d*) 2 Atk. 254. 4 Madd.

(*i*) 2 Anst. 531. 3 Atk. 518.

254.

(*k*) 2 Vern. 84. 1 Ball and

(*e*) 1 Madd. Rep. 266.

Bea. 202.

Mortgagee in Possession grossly mismanages the Estate, he is answerable for *Wilful Default*; thus, if he turns out or refuses a sufficient Tenant, he will be accountable(*a*); and so if he speculates, it must be at his own Risk (*b*); a Mortgagee is not allowed to make a Charge as Receiver, if he himself has personally received the Rents (*c*); though it may have been agreed that he should be paid for his Trouble in receiving them (*d*), and a Receiver might have been employed at the Expense of the Mortgagor (*e*); but if he actually paid a Bailiff for receiving the Rents, he will be allowed the Payment(*f*); if Mortgage Money and Interest be tendered to the Mortgagee or his Executors, Interest ceases from the Time of Tender made (*g*): but there must be reasonable Notice, as six Months, and a personal Tender, if no Place of Payment is mentioned; and the Mortgagor must swear that he kept his Money ready to prevent Interest running on, and that he made no Profit of it (*h*). Interest upon Interest is not allowed (*i*), especially if there is a subsequent Incumbrancer, though provided for in the Mortgage Security (*k*): to turn Interest into Principal, the Interest must be due, and a *Writing signed* by the Parties, to Charge the Land (*l*); but under an Order of Reference, and a Report made of what is due for Principal, Interest and Costs, Interest will be subsequently allowed upon the Whole if the Parties are Adult (*m*); an Account settled by the Master between the Mortgagor and the first Mortgagee, binds the second Mort-

(*a*) 1 Vern. 45.

(*b*) 12 Ves. 493.

(*c*) 1 Vern. 316. 3 Atk.
518. 2 Sch. and Lefr. 301.

(*d*) 2 Atk. 120.

(*e*) 2 Atk. 504. 10 Ves.
405.

(*f*) 1 Vern. 316. 3 Atk.
518. 3 Madd. 170.

(*g*) 1 Ch. Ca. 29. 1 Eq.

Ca. Abr. 318.

(*h*) 2 P. Wms. 378. 3 Atk.
90. 2 Ves. 372, 678.

(*i*) 1 P. Wms. 652. 3 Bro.
C. C. 440.

(*k*) Ambl. 12. 2 Ed. 200.

9 Ves. 271.

(*l*) 2 Atk. 332. 3 Salk. 449.

(*m*) 2 Vern. 292.

gagee, unless tainted with Fraud or Collusion (*a*). It may be useful to remark, that wherever the Mortgage is executed, if the Contract is to pay the Mortgage Money in London, the Expence of remitting the Money there has been holden to fall upon the Mortgagor (*b*); lastly, it should be observed, that after a Foreclosure and Sale, an Action on the Bond for the Balance opens the Foreclosure, and the Account of the Rents and Profits as if no Sale had taken place: but where the Balance was trifling, and the Sale of long standing, the Action was restrained by a perpetual Injunction (*c*); so long as the Mortgagee keeps the Estate, he takes the Pledge as a Satisfaction, but if it is sold fairly, and proves insufficient, he may resort to the Collateral Bond to recover the Deficiency (*d*).

If the Decree directs the Master to distinguish what Part of the Testator's personal Estate is Principal, and what has accrued for Interest, it may be shewn by the Defendant's Discharge, but if it should run to any considerable Length, it would be more conveniently done by a State of Facts, setting out the Account with the requisite Accuracy, and brought in by either Party, and the usual Warrants on leaving, and to Proceed, taken out and served on the respective Clerks in Court, attended and allowed.

The Defendant's Solicitor is not required to attend the Sale of the Estates; if the Plaintiff's Solicitor carries on the Cause, he takes upon himself to conduct the Sale; but to prevent the Estates from being disposed of at an Under-value, the Attendance of the Defendant's Solicitor may be necessary if a Receiver of the Rents and Profits has not been appointed: after the Sale is over, the Plaintiff's Solicitor will carry in a *further Charge* of the Rents and Profits of the real Estate, received by the Defendants the Ex-

(*a*) 1 Eq. Ca. Abr. 12. 2
Ch. Ca. 299.

(*b*) 11 Ves. 314.

(*c*) 8 Ves. 527. 13 Ves.
198.

(*d*) 2 Bro. C. C. 125, Dick.
785.

ecutors, down to the Time of the Purchaser being let into Possession and Receipt of the Rents; an Office-Copy of which must be taken by the Defendant's Solicitor, and the Plaintiff's Warrant thereon attended, and when the Charge is allowed, the Defendant must bring in his Discharge, consisting of Payments made for Taxes, Repairs, and all other Outgoings, which must be fair copied and left at the Master's Office, and the usual Warrants on leaving and to proceed, taken out and served on the Plaintiff's and other Clerks in Court, for the Parties active in the Cause; the Receipts for Taxes, Bills and Receipts for Repairs, and all other Vouchers must be produced, and the Discharge proceeded on and allowed. When the Purchase has been absolutely confirmed, if any Dispute arises between the Purchaser and the Plaintiff's Solicitor, and they differ as to the Conveyance, the Draft of the Conveyance must be brought into the Master's Office to be settled by him as directed by the Decree, but unless the Executors are made Parties, it is not necessary for those Defendants to attend: if they do attend, Office Copies of the Draft must be taken: these should be carefully perused, and the Warrants to settle attended, and if there are any Objections to the Draft, they must be stated to the Master, and disposed of before he will sign the Certificate of Allowance (a); when the Conveyance is settled, it will be engrossed in the Master's Office, and whatever Defendant is made a Party, his Solicitor should attend the Execution by him.

The Plaintiff's Solicitor, after all the Directions in the decretal Order have been carried into Effect, will take out a Warrant upon preparing the Draft of the Master's General Report, and the Defendant's Solicitor, and usually the Solicitors for all the Parties interested in taking the Accounts, upon Service of the Warrant, apply at the Master's Office for Copies: the Warrants to settle the Report must be attended, and any Objections to the Draft must be stated

(a) Ant. 417.

to the Mas'er before it is settled (*a*): When the Report is signed, the Plaintiff takes it away and files it in the Report Office. It may not be improper to observe that, upon any Delay or Neglect, any Party may bespeak the Report and proceed in the Cause: even a Creditor or a Legatee would be allowed to prosecute a Decree (*b*). The Course of Proceeding upon Objections and Exceptions, will be found in a former Part of this Work (*c*). When the Report has been confirmed absolutely, which may be done in the first Instance, by Consent of all Parties, the Defendant's Solicitor must take an Office Copy from the Report Office; the Plaintiff's Solicitor will then obtain and serve upon the Clerks in Court the Order for setting down the Cause for further Directions, and the Defendant's Solicitor should search at the Register Office, to learn how far off the Cause stands in the Book of Causes there.

For Hearing on further Directions, the former Brief, with the Master's Report abbreviated and fair copied, and Observations and Instructions (if any) for special Directions, must be given, usually to the Counsel retained upon the former Hearing.

The Defendant's Solicitor upon the Cause being called on by the Register, should be in Attendance, and prepared with the Decree and Report, and all the necessary Papers and Proceedings, for which sufficient Instructions have been already given; and after the Cause has been heard, and a Decree pronounced, he must apply to the Register for a Copy of the Minutes, and take the usual Course for varying, (if necessary,) and for passing and entering the Decree, of which the Defendant's Solicitor should take especial Care to have a correct Office-Copy. The final Decree always directs the Executors to pay the Balances reported to be in their Hands, into the Bank, in the Name of the Ac-

(*a*) 7 Ves. 587.

(*c*) Ant. 428.

(*b*) 2 Ves. j. 165. 3 Meri.
458.

countant-General of the Court, to the Credit of the Cause generally, or to some particular Account. If this Payment should be delayed beyond a reasonable Time, the Plaintiff will apply upon Notice for an Order upon the Defendants to pay the Balance reported to be in the Executor's Hands, at a given Day; if further Time should be required, the Executors must instruct Counsel to appear upon the Motion, and request an Extension of the Time; and if any special Circumstance should be stated, it must if necessary, be in the Form of an Affidavit: if the Payment be not made within the Time limited by the Order, the Accountant-General may refuse to accept it; in such Case, Recourse must be had to a farther Order; and if the Money should not then be paid, the Course the Plaintiff may take to enforce the Order and the Consequences, has been already explained (a).

In carrying the Order into effect, it may be useful to learn that Money is paid into the Bank, by leaving the Decree or Order directing the Payment at the Accountant-General's Office, and if the Sum is liquidated by the Master's Report, that must be also left. The Accountant-General will make out a Direction in writing to the Bank to receive the Money; this Certificate the Solicitor must produce at the Bank, and if any Part consists of Bank Notes, he must write thereon his Name and Place of Residence, and Deliver them to one of the Cashiers, who will set his Initials to each Note, and cancel it; the Money in Specie must be paid to one of the Tellers, and he in Return will give a Check for the Amount; the cancelled Notes and Check, with the Accountant-General's Direction, must be taken to the Chancery Office at the Bank, and the Clerk there will make out a Receipt and mark it *Entered*, which the Cashier, will upon Application sign; the Cashier's Receipt must be left at the Accountant-General's Office in Chancery Lane, and the Payment will then be complete; the Accountant-General will make out

and file in the Report Office, a Certificate of the Payment, with the Bank Certificate annexed, and Deliver out an Office Copy.

It remains to subjoin that *a Party* attending his own Suit, is privileged from Arrest (*a*). And if arrested in going to put in his Answer (*b*), or in going before a Master to prove a Debt (*c*), or returning from an Attendance, or a Warrant to produce Papers (*d*), or on his Return from attending a Motion in the Cause; the Court will on Motion, examine the Parties personally, and not by Affidavit, and Discharge him from the Arrest, and all Detainers in other Actions (*e*): necessary Deviations are allowed, and the Question will turn upon the *bona fides* of the Application (*f*). *A Solicitor* arrested on his Return direct from attending his Client's Business in Court, without Delay or Deviation, has upon *viva voce* Examination of himself and the Officer, been discharged (*g*). And so on his Return from an Attendance on the Master; he has been discharged in the original Action, and all Detainers, by Order made upon all the Plaintiffs (*h*); or where arrested on his Way to Lincoln's Inn Hall, without Deviation, to attend a Bankrupt Petition (*i*): and the Privilege has been extended to a Witness going to make an Affidavit before a Master (*k*); a Detainer in all these Cases, lodged before the Party can be discharged, cannot be supported (*l*). The application should be made to the Court of which the Proceeding is a contempt (*m*): but where the Application fails subsequent Detainers stand (*n*).

Lastly, may be considered Applications for Money which has been paid into the Bank of England, in the Name of

(*a*) 1 Ch. Rep. 217. Com.
411. 7. Ves. 314.

(*b*) 1 Ch. Rep. 92.

(*c*) 2 Ves. Bea. 374.

(*d*) 1 Mad. Rep. 580.

(*e*) 5 Ves. 2. Dick. 780.

(*f*) 9 Ves. 69.

(*g*) 14 Ves. 183.

(*h*) 8 Ves. 598. "

(*i*) 16 Ves. 242.

(*k*) 2 Ves. and Bea. 395.

(*l*) 4 Ves. 691.

(*m*) 2 Ves. and Bea. 374.

(*n*) 10 Ves. 328.

the Accountant-General, or Stock or other Securities transferred into, and standing in his Name, in Trust for the Suitors of the Court, the Dividends and Interest of which, are received by the Bank under a Power of Attorney from him, and entered in a Quarterly Dividend Book, countersigned by the Accountant-General, and deposited in the Report Office. Upon the Marriage of a Woman intitled to the Interest of a Fund standing in the Accountant-General's Books to her separate Use, there must not only be Proof of the Marriage and Identity, but it must be shewn that there is no Settlement, nor Agreement to settle the Whole, or any Part of the Money (a): and in a Creditor's Suit, where there is a Fund in Court, Debts reported due, are by the Decree on further Directions, ordered to be paid to the Creditor himself, and the Solicitor in the Cause is obliged to attend at the Accountant-General's Office for the Purpose of Payment, with the Master's Report and Decree, shewing the Debt due, upon payment of 6s. 8d.: if upon tender of that Fee, he refuses to attend, the Court will order him to attend, and visit him with the Costs of the Application (b): if the Creditor is an Infant, he must obtain an Order for Payment when he comes of Age, a Certificate of Baptism is not sufficient. And where the Representatives of a deceased Person apply as such for Payment of Money out of Court, the Accountant-General having no Authority under a Provincial Administration to pay any Sum exceeding £50: to obtain payment of a larger Sum, a Prerogative Administration must be taken out (c); and the Probate is received as Proof of the Death of a Party. For Shares of a Canal running through the Provinces of Canterbury and York, one Prerogative Probate has been held sufficient (d): a Domicil in *India*, is in legal Effect, a Domicil in the Province of Canterbury, and the

(a) 10 Ves. 290.

(c) 3 Bro. C. C. 240. 6 Ves.

(b) 5 Madd. 447. Ant. 380. 118. 12 Ves. 417.

(d) 2 Wils. C. C. 166.

Law of England, being applicable to personal Property there, a Probate in the Prerogative Court of Canterbury would be sufficient (*e*); a Power of Attorney attested by two Witnesses, executed in *Paris*, and authenticated by a Notary there, verified by Affidavit of the Notary has been ordered to be acted upon by the Accountant-General (*a*); so a Power of Attorney executed in North America, attested by a Notary Public, and authenticated by the Secretary of State of the Country; but an Affidavit of the Execution of an Instrument before the Mayor of a Foreign City, will not be received, without Evidence of his holding that Situation (*b*). Where an Order is made to pay in a specific Sum, the Accountant-General will not receive less than the whole Sum, for the latter Purpose, a subsequent Order must be obtained (*c*); and if an Account has been entered in the Accountant-General's Books in wrong Names, through a Misnomer in the Decree, an Order may be obtained to alter the Decree, and the Entry in the Accountant-General's Office (*d*). To lay out Money which has been paid in, the Accountant-General's Certificate of the Money being paid in; and then standing in his Name must be obtained (*e*), for these Certificates no Fee is paid: but for a Transcript of the Account from the Ledger, a Fee of 2s. for each Side, Debtor and Creditor is allowed to the Clerks, but no additional Sheet, unless one or other of the preceding Sheets contains twenty Items: and for drawing Powers of Attorney or Affidavits, a Fee of 3s. 6d. exclusive of Stamps (*f*).

(*e*) 5 Madd. 406.

(*f*) 1 Madd. Rep. 227.

(*g*) 6 Ves. 823. 1 Ja. and Sta. 180. 1 Do. and Ry. 324.

(*h*) 1 Ves. j. 171.

(*i*) 2 Madd. Rep. 391.

(*k*) 1 Atk. 519.

(*l*) Com. Rep. of Fees 29.

BILL OF COSTS

FOR

A DEFENDANT,

Where Bill dismissed for Want of Prosecution.

IN CHANCERY.

Ralph Leycester,

PLAINTIFF;

AND

Peter Brooke, and another,

DEFENDANTS.

HILARY TERM, 1822.

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
ATTENDING Defendants, advising on the Bill filed, and taking Instructions to appear -	0	6	8	0	6	8
Paid entering Appearance (a)	0	6	8			
Paid for Office Copy of Bill, fol. 42	2	9	0	(b) 2	9	0
Making a close Copy thereof	0	14	0	(c) 0	14	0
Instructions for Counsel to move for a Month's Time to answer	0	2	6			
Fee to him to move -	0	10	6			
Attending him, and Register to draw. up and enter Order -	0	6	8			

(a) Six Shillings and Eight Pence is allowed for every Defendant who appears separately, entering the Appearance of more than three Defendants; 6s. 8d. for every three Defendants, exclusive of the Term Fee. *Ord. Canc. 1807.*

(b) The Bill being amended, on 20s. Costs, the longest Office-Copy is allowed.

(c) Close Copies are not allowed in Town Causes.

BILL OF COSTS FOR DEFENDANTS. 601

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Paid for Order, Copy, and Service	0	8	6			
Term Fee, Clerk, and Solicitor	0	16	8			
Letters and Messengers -	0	5	0			

HILARY VACATION FOLLOWING.

Drawing and engrossing Petition for three weeks further Time to answer, and Duty (a) -	0	5	7	0	5	7
Paid answering same -	0	5	6	0	5	6
Paid for Order, Copy, and Ser- vice (b) -	0	8	6	0	8	6
Attending Register to draw up Order -	0	6	8	0	6	8
Attending Defendant Brooke, taking Instructions for Answer	0	13	4			
The like Attendance on the Defen- dant, Starkie -	0	13	4			
Drawing Answer, fol. 36 -	1	16	0			
Attending the Defendants, reading over and settling the same	0	18	4			
Fair Copy of the Answer, for Counsel to peruse and sign (c) -	0	12	0	0	12	0
Fee to Mr. Maddock to settle and sign, and Clerk -	2	4	6	0	2	6
Attending him -	0	6	8	0	6	8
Letters and Messengers -	0	5	0	0	5	0

EASTER TERM, 1822.

Engrossing Answer, fol. 36 -	0	18	0
Paid for Parchment -	0	5	0

(a) Sixpence per Sheet for drawing common Petitions, and 4d. for engrossing; and special Petitions 1s. per sheet, including the Copy. and 4d. engrossing.

(b) Only one Order allowed between Party and Party.

(c) The fair Copy is included in the 1s. allowed for drawing.

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Attending Defendants, reading over Answer as engrossed, and attending them to the Public Office to swear same	0	13	4			
Paid Oaths	0	2	0			
Paid filing Answer	0	3	4			
Term Fee, Clerk, and Solicitor	0	16	8			
Letters and Messengers	0	5	0			

TRINITY TERM, 1822.

Abbreviating (a) Bill, and Answer, fol. 42, 36=78	1	6	0	1	6	0
Two fair Copies thereof for Counsel, seven sheets each	2	6	8	2	6	8
Term Fee, Clerk and Solicitor	0	16	8			
Letters and Messengers	0	5	0			

HILARY VACATION, 1823.

Drawing Notice to dismiss Bill for Want of Prosecution, Copy and Service	0	2	0			
The Plaintiff having obtained an Order to withdraw his Replication and amend his Bill, Term Fee, Clerk, and Solicitor	0	16	8			
Letters and Messengers	0	5	0			

EASTER TERM, 1823.

Drawing Notice of Motion to discharge Plaintiff's Order to amend his Bill, Copy, and Service	0	5	0	0	1	0
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(a) The Bill being afterwards amended, the Solicitor is allowed abbreviating the longest Copy, whether original or amended Bill; if the Bill has been dismissed before a Replication, the Charge for abbreviating is not allowed.

FOR DEFENDANTS.

603

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Drawing and engrossing Affidavit of the Service, Duty, and Oath	0	7	7			
Paid filing, and for Office-Copy	0	6	7			
Instructions for Counsel to move	0	2	6			
Fee to him therewith	0	10	6			
Attending Counsel and Register to draw up and enter Order	0	6	8			
Paid for Office-Copy Order to amend	0	3	0			
Attending Court when the Plaintiff undertook to amend within ten Days	0	13	4			
Paid for Order, Copy, and Service	0	9	0	0	0	6
Paid (a) for Office-Copy amended Bill, fol. 50	2	18	4			
Attending the Defendant, Richard Brooke, taking Instructions for Answer	0	13	4			
The like Attendance on the Defendant, Starkie	0	13	4			
Drawing Answer, fol. 22	1	2	0			
Attending Defendants reading over Answer	0	13	4			
Fair Copy for Counsel to settle and Sign (b)	0	7	4	0	7	4
Fee to Mr. Maddock and Clerk	1	3	6	0	2	6
Attending him	0	6	8			
Engrossing Answer and Parchment	0	16	6			
Attending the Defendants, reading over the Answer, and afterwards to swear same	0	13	4			

(a) Where a Bill is amended, the longest Office-Copy only will be allowed in Costs between Party and Party, the 20s. paid amending the Bill on a new Engrossment, are considered adequate, although the Office-Copy may be ten times its Amount.

(b) The fair Copy is allowed in the 1s. for Drawing.

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Paid Oaths -	0	2	0			
Paid filing Answer -	0	3	4			
Term Fee, Clerk, and Solicitor	0	16	8			
Letters and Messengers -	0	5	0			

TRINITY TERM, 1823.

Abbreviating amended Bill, and Answers, fol. 50, 42, 22—114	1	18	0			
Two fair Copies of the Amend- ments and Answers, to add to the former Briefs, two Brief Sheets each -	0	13	4	0	13	4
Term Fee, Clerk, and Solicitor	0	16	8			
Letters and Messengers -	0	5	0			

TRINITY TERM VACATION, 1823.

Drawing Notice to dismiss for Want of Prosecution, Copy, and Service	0	3	0	0	1	0
Drawing and engrossing Affidavit of Service of Notice and Oath	0	7	1			
Paid filing and for Office-Copy	0	6	10			
Six Clerks' Certificate of Replica- tion filed -	0	3	4			
Instructions to move -	0	2	6			
Fee to Mr. Maddock to move	0	10	6			
Attending him, and Register to draw up and enter Order -	0	6	8			
Attending Court when the Plaintiff undertook to speed the Cause	0	6	8	0	6	8
Paid for Order, Copy, and Service	0	9	0	0	1	0
Term Fee, Clerk, and Solicitor	0	16	8			
Letters and Messengers -	0	5	0			

FOR DEFENDANTS.

605

CHARGE.			TAX OFF.		
£	s.	d.	£	s.	d.

MICHAELMAS TERM, 1823.

Drawing Notice to dismiss Bill for Want of Prosecution, Copy, and Service -	0	2	0		
Drawing and engrossing Affidavit of Service of Notice and Oath	0	8	1		
Paid filing same, and for Office-Copy	0	7	0		
Instructions to Counsel to move	0	2	6		
Feeto Mr. Maddock -	0	10	6		
Attending him and Register to draw up and enter Order -	0	6	8		
Attending Court on Motion and Bill dismissed with Costs -	0	6	8		
Paid for Order and Entry -	0	8	0	0	1 6
Copy and Service -	0	2	0		
Drawing Bill of Costs and Copy, fol. 18. -	0	12	0		
Warrant on leaving Copy and Ser- vice -	0	4	6		
Warrant to Tax, Copy, and Service	0	4	6		
Attending Clerk in Court, and Solici- tor, but no Attendance on the other Side (a) -	0	13	4		
Another Warrant, Copy, and Ser- vice -	0	4	6		
Attending Clerk in Court, and So- licitor, when Costs taxed ex parte	0	13	4		
Paid Oath of Service of the War- rants -	0	1	0		
Paid for a Copy of the Defendants' Bill of Costs, fol. 16 -	0	10	8		

(a) The Clerk in Court must attend in Person, otherwise his Attendance will be disallowed, if objected to before the Master.

606 BILL OF COSTS FOR DEFENDANTS.

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Paid for the Master's Report -	0	15	0			
Attending the Master for Report.						
and filing same - -	0	6	8			
Gave Master's Clerk	0	2	6	0	2	6
Paid Filing the Report, and Office-						
Copy - - -	0	5	10			
Paid for a Subpœna for Costs, and						
personal Service (a) (conditional)	0	13	0			
Term Fee, Clerk, and Solicitor	0	16	8			
Letters and Messengers -	0	5	0			

(a) Personal Service in Town is 5s. in the Country 10s.; a Subpœna for Costs must be served personally, the Costs are always made payable to Bearer.

BILL OF COSTS

FOR

A DEFENDANT,

Where Bill dismissed upon the Application of the Plaintiff.

IN CHANCERY.

BETWEEN *George Bostock,*

PLAINTIFF;

AND

*Charles Vernon, an Infant,
and Mary Vernon,*

DEFENDANTS.

THE DEFENDANTS' BILL OF COSTS.

HILARY TERM, 1823.

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
ATTENDING Defendants, and taking						
Instructions to appear	0	6	8			
Paid entering Appearance -	0	6	8			
Paid for Office Copy Bill, fol. 50	2	18	4			
Close Copy to send into the Country	0	16	8			
Term Fee - -	0	16	8			
Letters and Messengers -	0	6	0	0	1	0

EASTER TERM, 1823.

Attending taking Instructions, for						
Answer of the Defendant the In-						
fant - - -	0	13	4			
Drawing and Engrossing Petition						
for six Weeks Time to answer	0	5	1	0	5	1

			CHARGE.			TAX OFF.		
			£	s.	d.	£	s.	d.
Paid answering	-	-	0	5	6	0	5	6
Order and Entry	-	-	0	6	6	0	6	6
Copy and Service	-	-	0	2	0	0	2	0
Drawing Petition to assign Guardian for Infant Defendant	-	-	0	6	1			
Paid answering	-	-	0	5	6			
Order and Entry	-	-	0	6	6			
Copy and Service	-	-	0	4	0	0	2	6
Paid for Special Dedimus to assign Guardian, and to take the Answer			1	3	7			
Private Seal	-	-	0	3	6	0	3	6
Drawing the Defendant's, the In- fant's Answer, fol. 13	-	-	0	13	0			
Attending reading over and settling Answer	-	-	0	6	8			
Fair Copy to send into the Country			0	4	4			
Fee to Mr. Maddock to peruse, and Clerk	-	-	1	6	6			
Attending him thereon	-	-	0	6	8			
Engrossing Answer and Parchment			0	16	6			
Drawing Notice to take Answer, Copy and Service	-	-	0	3	6			
Attending Commissioners to sign same	-	-	0	6	8			
Service upon Plaintiff's Commis- sioner	-	-	0	6	8			
Attending Guardian reading over Answer before sworn	-	-	0	6	8			
Paid two Commissioners at Chester, taking Answer and assigning Guar- dian	-	-	2	2	0	0	15	4
Solicitor's Attendance at the Execu- tion of the Commission	-	-	0	6	8			
Paid Carriage of Answer to London			0	5	0			
Oath of Messenger thereon	-	-	0	1	0			

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Solicitor attending the Messenger therewith, to the Public Office to get him sworn - -	0	6	8			
Paid filing Answer -	0	3	4			
Attending Defendant Mary Vernon taking Instructions for Answer	0	13	4			
Drawing same, fol. 39 -	1	19	0			
Fair Copy for Defendants' Solicitor sent into the Country (a). -	0	13	0			
Fee to Mr. Maddock to peruse, settle, and sign same, and Clerk -	2	4	6			
Attending him several Times thereon	0	6	8			
Attending Defendant, reading over Answer as altered by Counsel	0	13	4			
Engrossing Answer and Parchment fol. 39 - -	0	19	6			
Instructions to Counsel to move for Commission to take Answer	0	2	6			
Fee to Mr. Maddock therewith	0	10	6			
Attending him, and Register to draw up and enter Order -	0	6	8			
Paid for Order and Entry -	0	6	6			
Copy and Service - -	0	2	0			
Attending Defendant reading over Answer before sworn, and to swear same - -	0	13	4			
Paid for Dedimus to take Answer	0	16	11			
Drawing Notice of executing Commission, and Copy -	0	3	6			
Attending Commissioners signing same - - -	0	6	8			
Service thereof upon Plaintiff's Commissioner - -	0	6	8			

(a) Not allowed if Defendant resides in Town.

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Paid two Commissioners, attending Execution of Commission -	1	6	8			
Solicitor's Attendance on Commission, and returning Commission	0	18	4			
Paid Carriage of Answer to London	0	5	0			
Paid Oath of Messenger -	0	1	0			
Solicitor's Attendance on the Messenger to procure him to be sworn at the public Office (a) -	0	6	8			
Paid filing Answer - -	0	8	4			
Term Fee, Clerk, and Solicitor	0	16	8			
Letters and Messengers -	0	6	0	0	1	0

HILARY TERM, 1824.

Drawing and engrossing Petition for Appointment of a new Guardian, Mr. Maddock having advised that the Defendant Mary Vernon the Mother, was improper -	0	6	1	0	6	1
Paid answering Petition -	0	5	6	0	5	6
Order and Entry - -	0	6	6	0	6	6
Paid for Commission to assign Guardian - - -	1	3	4	1	3	4
Paid two Commissioners attending to execute Commission and assign Guardian - -	1	6	8	1	6	8
Solicitor's Attendance thereon	0	6	8	0	6	8
Drawing and engrossing Appointment of Guardian and Parchment	6	8	8	0	8	8
Paid Carriage to Town -	0	5	0	0	5	0
Drawing Notice to dissolve Injunction, Copy, and Service (b)	0	4	0	0	2	0
Abbreviating Pleadings, Bill, fol. 50, Answers fol. 18, 39=102 -	1	14	0			

(a) Allowed, if attendance actually had,

(b) Not a special Notice.

FOR DEFENDANTS.

611

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Two fair Copies for Counsel, eight						
Brief Sheets each -	2	3	4			
Two Copies Notice to annex	0	1	0			
Fee to Mr. Sugden and Clerk, with						
Brief - - -	4	6	6	0	2	6
Attending him therewith -	0	6	8			
Fee to Mr. Maddock and Clerk, with						
Brief - - -	2	4	6	0	2	6
Attending him therewith -	0	6	8			
Drawing and engrossing Affidavit						
of Service - - -	0	6	7			
Paid filing, and for Office Copy	0	5	1			
Attending Court, Motion come on,						
and Injunction dissolved -	0	13	4			
Order and Entry - - -	0	6	6			
Copy and Service - - -	0	2	0			
Term Fee, Clerk, and Solicitor	0	16	8			
Letters and Messengers -	0	5	0			

MICHAELMAS TERM, 1824.

Term Fee, Clerk, and Solicitor	0	16	8
Letters and Messengers -	0	5	0

TRINITY VACATION, 1825.

Drawing Notice to dismiss Bill, for			
Want of Prosecution, Copy, and			
Service (a) - - -	0	2	0
Six Clerks' Certificate of Pleadings	0	3	4
Drawing and engrossing Affidavit			
of Service of Notice -	0	6	7
Paid filing, and for Office Copy	0	5	1
Instructions to Counsel to move to			
dismiss - - -	0	2	6
Fee to Mr. Maddock -	0	10	6

(a) Not a special Notice.

612 BILL OF COSTS FOR DEFENDANTS.

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Attending him, and Register to draw up and enter Order -	0	6	8			
Attending Court - -	0	13	4			
Order and Entry -	0	6	6			
Copy and Service - -	0	2	0			
Term Fee, Clerk, and Solicitor	0	6	8			
Letters and Messengers -	0	5	0			

MICHAELMAS TERM FOLLOWING.

The Plaintiff having obtained an Order to dismiss his Bill with Costs, drawing Bill of Costs, and Copy for the Master, fol. 20						
	0	13	4			
Nov. 20th. Warrant on leaving Copy, and Service -	0	4	6			
— 22d, 24th, 26th, Three War- rants to tax Copies and Services	0	13	6			
Attending taxing Clerk in Court, and Solicitor - -	2	0	0	0	13	4
Oath of Service of Warrants	0	1	0			
Paid for Report of Costs -	0	15	0			
Gave Master's Clerk -	0	5	0	0	2	6
Paid filing Report - -	0	4	10			
Attending to file and Office Copy	0	6	8			
Subpoena for Costs)	0	8	0			
Personal Service in } conditional the Country -	0	10	0			
Term Fee, Clerk, and Solicitor	0	16	8			
Letters and Messengers -	0	5	0			

PRACTICAL DIRECTIONS

AND

REMARKS.

A Plaintiff in any Stage of the Suit *previous to the Decree*, may as of course apply to dismiss his Bill upon Payment of Costs (*a*); where a Cause was at issue, and in the Paper for Hearing, Sir William Grant after great Consideration, allowed a Plaintiff to dismiss his Bill with Costs (*b*); and even after an Issue has been directed, but not after a Decree (*c*). By a legislative Provision, upon the Plaintiff's dismissing his own Bill, or the Defendant dismissing the same for want of Prosecution, the Plaintiff in such Suit, shall pay to the Defendant full Costs to be taxed by a Master (*d*); where some of several Plaintiffs have wished to dismiss the Bill as against themselves with Costs, it has been allowed on Terms, and without Notice to, or consent of the Co-Plaintiffs (*e*); if a Plaintiff has been released for the Purpose of being examined as a Witness for a Co-Plaintiff, his Name has upon Motion been allowed to be struck out of the Bill upon Payment of Costs, or Security given for the Costs to that Stage of the Suit (*f*): as the Plaintiff is answerable for the Costs of a Bill filed in his Name (*g*),

(*a*) 1 Ves. j. 402.

(*d*) 4 Ann. c. 16. s. 23.

(*b*) Locke v. Nash 31 May, 1816, MS. 2 Madd. Ch. 389. Dick. 280.

(*e*) 13 Ves. 167. 4 Madd. 50.

(*f*) 6 Ves. 145.

(*c*) 1 Ch. Ca. 40. 3 Atk. 558. Dick. 280.

(*g*) 1 Cox. 196. 2 Cox. 235.

his Solicitor has been compelled to pay the Costs of Dismission, where the Bill was filed without his Consent, or without a special Authority for instituting the Suit (*a*); in one Instance, where the Defendant by his own Act, rendered the Suit useless, a Plaintiff was allowed to dismiss his Bill without Costs (*b*); but in general Practice, the Plaintiff is not allowed to dismiss his Bill, or strike his Name out of the Bill, but upon Costs paid or secured to be paid, unless consented to by the Defendant (*c*): a written Agreement between the Parties to dismiss the Bill without Costs, is not a sufficient Ground to make an Order, an express Consent is required, but it may be sufficient to authorize the Court to make an Order to dismiss, unless Cause be shewn (*d*); Lord Redesdale was of opinion that a Bill could not be dismissed by *mere Agreement* of the Parties, that the Suit shall cease; but that some Step in Court must be taken for that Purpose, either to dismiss, or stay Proceedings (*e*). As against a Pauper Defendant; it has been held that Pauper Costs only are allowed on Taxation (*f*); but Lord Eldon seems to hold that the Costs are in the Discretion of the Court (*g*). After a Decree, a Bill cannot be dismissed by Consent, it can be dismissed only upon re-Hearing or Appeal (*h*); where a decretal Order has merely directed Enquiries to determine the Court what is to be done, the Parties have been allowed on Motion, by Consent, to have such an Order as would be made on further Directions, and to dismiss the Bill with Costs (*i*).

After Answer, the Plaintiff may proceed to a Hearing by replying to the Answer, and serving a Subpoena to rejoin,

(*a*) 3 Meri. 12.

(*b*) 1 Cox. 359.

(*c*) 1 Ves. j. 140.

(*d*) 1 Cox. 27.

(*e*) 2 Ja. and Wa. 345.

(*f*) 2 Cox. 410.

(*g*) 16 Ves. 232. Beam.
Costs. 123.

(*h*) 11 Ves. 602. 1 Ch. Ca.
40. 3 Atk. 558.

(*i*) 11 Ves. 160.

examining his Witnesses in Court or by Commission, and giving Rules to produce Witnesses, and to pass Publication, and then setting down the Cause to be heard, the Whole of which may be with ease accomplished in two Terms after the Answer has come in; but if on perusing the Answer, the Plaintiff is advised that the Bill will be dismissed with Costs, he will frequently delay the Proceedings as long as possible, and so circumstanced the Defendant will be obliged either to force the Suit on to a Hearing, or to dismiss the Bill for want of Prosecution. By the Course of Practice, the Plaintiff is not obliged to reply until three clear Terms have elapsed, exclusive of that in which the Answer is filed, or any other Step taken by the Plaintiff; as in the Instance of an Answer filed in Easter Term or Vacation, the Defendant cannot move to dismiss until the first Seal after the following Hilary Term; and so, as to all subsequent Proceedings, three clear Terms must intervene between each Proceeding, before the Defendant can apply to dismiss the Bill for want of Prosecution: but in any Stage of the Suit before a Rule given to produce Witnesses (*a*), or a Subpoena issued to rejoin (*b*); if three Terms elapse without any Step taken in the Cause, the Defendant may under the general Rule obtain an Order as of course, to dismiss the Bill with Costs (*c*); before replication, Notice to dismiss is not necessary; if therefore, the Plaintiff suffers three clear Terms to elapse after the Answer has come in, exclusive of that in which the Answer was filed, and takes no Step in the Cause, the Defendant upon the Six Clerk's Certificate, may without Notice obtain an Order to dismiss the Bill with Costs (*d*); and it is sufficient for the Purpose of the Application, if the Certificate be produced to the Register before the Order is drawn up, though the Certificate may not have been ob-

(*a*) 1 Cox. 176.

(*b*) 1 Cox. 288.

(*c*) 1 Prax. Alm. 34.

(*d*) 15 Vcs. 291. 16 Vcs.
127, 204.

tained when the Order was applied for (*a*): and on the Face of the Order it should appear that the Certificate is of a Date posterior to the Order (*b*); but the Certificate should not state any subsequent Proceedings (*c*): and the Order to dismiss would be regular, pending an Injunction, whether common or special, on Merits restraining Execution (*d*); and although by the Dismission of the Bill, the Injunction falls with it: and the Pendency of Process against a co-Defendant standing out in Contempt, without whom the Cause cannot be heard (*e*), would be no Objection to the Dismission. The shewing Cause against dissolving an Injunction has not been held such a Proceeding, or as a Step taken in a Cause to prevent a Bill being dismissed for want of Prosecution (*f*). It may be material here to remark, that the Order to dismiss takes Effect from the Time it was pronounced, and not from the Time of Service; so that if any Step be taken, as the filing a Replication after the Order to dismiss is pronounced, though before it is drawn up, it will not prevent the Dismission of the Bill (*g*); but under special Circumstances, upon Notice and Affidavit accounting for the Delay, and putting the Plaintiff upon Terms, the Court has upon payment of Costs, discharged the Order to dismiss, and given Liberty to amend (*h*). It is not the ordinary Practice to restore a Bill which has been regularly dismissed for want of Prosecution, it may be done under Circumstances, and the Refusal of a Motion to discharge an Order to dismiss, does not constitute a Ground to prevent a Party from applying to have the Bill restored;

(*a*) 12 Ves. 465. 1 Ves.
and Bea. 310. 3 Ves. and
Bea. 170. 1 Ja. and Wa. 289.

(*b*) 10 Ves. 402. 1 Ves.
and Bea. 368.

(*c*) 5 Madd. 13.

(*d*) 16 Ves. 127. 3 Ves.
and Bea. 170. 2 Meri. 61. 63.

(*e*) 9 Ves. 512.

(*f*) 15 Ves. 291. 1 Cox,
111.

(*g*) 1 Ves. and Bea. 366. 1
Ja. and Wa. 288.

(*h*) 16 Ves. 204. 3 Ves. and
Bea. 1. 1 Madd. Rep. 265.

but a Bill regularly dismissed will not be restored for the mere Purpose of agitating the Question of Costs (*a*).

Notice to dismiss, though not necessary before Replication (*b*),) by the Courtesy between the Clerks in Court, (which Lord Eldon has disapproved, as an unwholesome Practice) (*c*), the Defendant's Clerk in Court upon Intimation from the Defendant's Solicitor, that he intends to dismiss the Bill, hands over a Note in Writing of such Intention to the Plaintiff's Clerk in Court, which gives the Plaintiff an Opportunity to take the usual Course to keep the Cause in Court, either by obtaining an Order to amend the Bill, or by filing a Replication to the Defendant's Answer ; if he adopts the former Expedient to keep the Cause alive, he may by Petition to the Master of the Rolls before, or even on the Day of the Application to dismiss, obtain as of course, an Order to amend the Bill, which has been decided to be in Time to prevent the Dismission (*d*) ; and in very urgent Cases, Service of a Copy of the Petition, with his Honour's *Fiat* thereto, preparatory to the Order thereon being subsequently drawn up and served, would equally prevent the Motion to dismiss and eventually the Question of Costs (*e*) ; but if the Plaintiff after obtaining the Order to amend, for the Purpose of keeping his Bill in Court, does not get that Order drawn up and served, until Defendant has a Right to dismiss, the Order will be considered a Nullity, and will not be allowed to defeat the Defendant's Application to dismiss the Bill (*f*). If the Plaintiff amends his Bill, the Amendment will prevent a Dismission until three clear Terms after that in which the Defendant files his Answer to the Amendments : and here it should be observed, that the Order to amend, so long as that Order remains in Force, prevents an

(*a*) 2 Meri. 63.

(*b*) 1 Ves. and Bea. 368.

(*c*) 3 Ves. and Bea. 171.

(*d*) 14 Ves. 208.

(*e*) 3 Madd. 216.

(*f*) 7 Ves. 222. 1 Ves.
and Bea. 523.

Application to dismiss; but if the Plaintiff should be guilty of any unnecessary Delay in amending, the Defendant may move the Court to discharge the Order to amend, and by the same Application to dismiss the Bill with Costs. For this Purpose, the Plaintiff's Solicitor must serve a Notice in Writing upon the Plaintiff's Clerk in Court, (*see Notices*) and obtain an Office-Copy of the Order to amend from the entering Register, and be prepared with an Office-Copy of an Affidavit of Service of the Notice, to read in Court; he must then give Instructions to Counsel to move pursuant to the Notice: if the Plaintiff appears by Counsel, the Court will put him upon Terms to amend within a given Time; (usually ten Days or a Fortnight, according to the Nature of the Suit) or in Default, that the Order to amend be discharged, and the Bill dismissed with Costs, without further Order. The Defendant's Solicitor must draw up and serve this Order with all convenient Dispatch, and unless the Plaintiff complies with the Terms of the Order, the Bill will stand absolutely dismissed with Costs, without further Application: but where the Defendant obtained an Order to dismiss, and had not served it till eight Months after, and between the Order and the Service, the Plaintiff obtained an Order to amend, the Plaintiff having had no Notice of the *ex parte* Order to dismiss, was held regular in his Order to amend (*a*); but if in Consequence of a Misrepresentation of the Plaintiff's Clerk in Court, the Defendant is led into an Irregularity in obtaining the Order to dismiss, the Order will be discharged, but the Plaintiff will be ordered to pay the Costs of discharging it (*b*); and if by a Slip of the Clerk in Court, a Replication has been omitted to be filed, the Cause, if dismissed, will be restored on the usual Terms (*c*).

If the Plaintiff files a Replication, the Defendant must give Notice of Dismission, and he cannot move to dismiss

(*a*) 3 Madd. 196.

(*c*) 6 Madd. 111.

(*b*) 14 Ves. 492.

the Bill for Want of Prosecution, unless the Plaintiff has omitted to take some Step in the Cause for three Terms, exclusive of the Term in which the Replication was filed. After the Expiration of three Terms, the Defendant must serve a Notice of Motion to dismiss, upon the Plaintiff's Clerk in Court, (*see Notices*) and obtain from his own Clerk in Court the Six Clerks' Certificate of the Replication being filed; but it will be sufficient if the Certificate is produced to the Register before the Order to dismiss is drawn up, and the Date, as before-mentioned, is not material (*a*): and if the Clerk in Court refuses to procure the Six Clerks' Certificate, the Court will make an Order upon him for that Purpose, and visit him with the Costs of the Application (*b*): An Affidavit of Service of the Notice must be made and filed, and an Office-Copy taken, and with the Six Clerks' Certificate, Instructions given to Counsel to move to dismiss the Bill. The Plaintiff upon this Motion, if he means to proceed, must by Counsel appear and undertake to speed the Cause; or he may elude the Motion by previously obtaining an Order to withdraw his Replication, and amend the Bill, on Payment of 20s. Costs: this may be done either by Petition to the Master of the Rolls, immediately on receiving the Notice, or by Motion of course, any Day at the Rising of the Court; and he may so time his Application, that the Order may be drawn up and served before the Motion to dismiss is made, and the Order has been held to be in Time, and sufficient to refuse the Motion to dismiss, though applied for after Notice, and on the same Day the Application to dismiss would have been made (*c*): if a Replication be filed after a special Notice to dissolve an Injunction and to dismiss the Bill, and before the Motion is made, the Motion is not sustainable, but the Defendant is intitled to the Costs of the Motion (*d*) A Repli-

(a) 10 Ves. 403. 12 Ves. 465. (c) 14 Ves. 208.
(d) 1 Madd. 39.

(b) 1 Ves. and Bea. 368.

cation filed after the Notice, and on the Day the Motion to dismiss is made, is regular, whether before or after the Motion is immaterial, there being no Fraction of a Day, but the Motion being of course, not special upon Notice, Costs of the Application in that Case are not given (*a*).

If the Plaintiff intends to proceed in the Cause, he gives Instructions to Counsel to appear on the Motion to dismiss, and enters into an Undertaking to speed the Cause; this Order must be drawn up and served by the Defendant's Solicitor, and should be done with all convenient Dispatch. If after such an Undertaking, the Plaintiff obtains an Order as of course, to withdraw his Replication and amend the Bill, it will be discharged upon the Application of the Defendant, with Costs for Irregularity (*b*); but in discharging an Order for withdrawing the Replication, the Court has allowed the Plaintiff to set down the Cause upon Bill and Answer; and where the Cause has been so set down, but no Subpœna to hear Judgment served, and Default made at the Hearing, the Undertaking has been held equivalent to serving a Subpœna, and the Bill dismissed with Costs (*c*); if the Plaintiff made out a special Case, his Application might be allowed (*d*): the only Answer to a Motion to dismiss for want of Prosecution, is *an Undertaking to speed the Cause*; and unless he enters into such an Undertaking, the Bill will be dismissed in the first Instance; but a Motion-Paper signed by Counsel, undertaking to speed the Cause, left at the Register-Office on the same Day the Motion to dismiss was made with the Register of that Day, has been held sufficient to discharge the Order to dismiss; and if the Defendant's Solicitor had Notice before the Order was drawn up, with Costs (*e*): if the Plaintiff has any special Ground, he cannot avail himself of it by Way of Answer to a Motion to dismiss, it must be made the Subject of

(*a*) 5 Madd. 60.

(*b*) 16 Ves. 126.

(*c*) 17 Ves. 130.

(*d*) 1 Cox. 397.

(*e*) 3 Madd. 240.

a separate and distinct Application (*a*). By a recent Decision; after an Undertaking to speed the Cause, the Plaintiff has only the next Term to proceed, and not the following Vacation (*b*): if he neglects to proceed in the next Term, the Defendant may give Notice to dismiss at the first Seal after Term, and the Court upon Affidavit of Service of the Notice and Production of the Order to speed the Cause, and the Six Clerk's former Certificate, will make an Order to dismiss the Bill, unless the Plaintiff's Counsel undertakes peremptorily to go to Commission that Vacation, to give Rules to pass Publication in the next Term, and set the Cause down for Hearing the following Term; and that in Default, the Bill to stand dismissed out of Court, without further Motion (*c*); but the Death of the Defendant would abate the Suit, and suspend the Effect of the Order (*d*).

If the Plaintiff, after he has undertaken to speed the Cause, obtains and serves a Subpœna to rejoin, the Bill cannot be dismissed for want of Prosecution (*e*), the Cause being at Issue, may be brought on for Hearing by Defendant: if the Plaintiff does not proceed, the Defendant may then give Rules to produce Witnesses and pass Publication in the next Term, and set down the Cause in the ordinary Course, *ad requisitionem Defendantis* (*f*); and where a Cause coming on to be heard stood over with Liberty to amend, and the Plaintiff amended, but proceeded no further, it was held not necessary to set down the Cause again, but that Defendant might move to dismiss the Bill for want of Prosecution (*g*); but the Plaintiff may create further Delay by applying previous to the Expiration of the Rule to pass Publication, to enlarge it upon the ordinary Suggestion, that it is in his own Delay; to defeat this Attempt, the Defendant must apply to the Court to impose Terms upon the

(*a*) 11 Ves. 608. 13 Ves. 456.

(*b*) 2 Madd. Rep. 123.

(*c*) 13 Ves. 456. 2 Madd. Rep. 124. notis.

(*d*) 1 Cox, 344.

(*e*) 1 Cox 288. 3 Atk. 558.

(*f*) 3 Atk. 558.

(*g*) 2 Cox 15.

Plaintiff, and take the Course laid down in a former Part of this Work.

In this Place we should observe, that if a general Demurrer is filed, and no further Proceedings taken, the Pendency of the Demurrer prevents the Dismission of the Bill (*a*); and the like as to a Plea, though accompanied by an Answer (*b*); the Reason assigned is, that the Defendant equally with the Plaintiff, has the Liberty of setting it down for Hearing: and so pending a Reference in a Suit for specific Performance, where both Sides are Actors (*c*).

A Bankrupt Plaintiff, whether the Bankruptcy is an Abatement or not, though the Suit may be considered as defective as if abated, must by some kind of Bill bring his Assignees before the Court, or suffer a Dismission of the Bill, though generally without Costs (*d*). After Replication, the Court has made an Order that the Assignees should file a Supplemental Bill, in the Nature of a Bill of Revivor, within a Fortnight, or that the Bill be dismissed (*e*). The Defendant becoming Bankrupt, does not disable him from moving to dismiss (*f*).

Where one of several Plaintiffs dies before Answer, the Defendant may move that the Surviving Plaintiffs revive the Suit, or the Bill be dismissed with Costs (*g*).

A Bill to perpetuate Testimony may be dismissed for want of Prosecution any Time before Replication and Examination (*h*), but not *a Bill for a Discovery* merely; there the Defendant after a full Answer, can only obtain an Order for Payment of Costs (*i*), including the Costs of resisting Motions, and other Expences (*k*): if set down, it

(*a*) 2 Ves. j. 287. 2 Cox, 377.

(*b*) Barn. 286.

(*c*) 2 Ves. and Bea. 377.

(*d*) Beam. Pleas, 291. 18 Ves. 424. 1 Rose. 196.

(*e*) 5 Madd. 80.

(*f*) 9 Ves. 615. 2 Madd. Ch. 387.

(*g*) 1 Turn. Rep. 258.

(*h*) Ambl. 237.

(*i*) 1 Atk. 286. 4 Madd. 178.

(*k*) 1 Madd. Rep. 344.

would be struck out of the Paper, and not dismissed. Where a Bill was retained for twelve Months, with Liberty to bring an Action at Law, and in Case such Action should not be tried within that Period, then the Bill to stand dismissed with Costs; and the Plaintiff did not try the Action within the Time, the Bill was held not ipso facto out of Court, but that Defendant must either set down the Cause for further Directions, or move to dismiss the Bill with Costs (*a*). After Dismission, the Court has Jurisdiction upon Motion in the Suit dismissed, to make an Order for Payment of Money to the Party intitled (*b*), though generally no Order can be made upon a Bill dismissed (*c*), which would in Effect amount to decreeing Relief. At the Hearing the Bill may be dismissed without Costs (*d*), or with Costs, as to some, and without Costs, as to other Parties (*e*), or partly with and partly without Costs (*f*); but it should seem, that by the Course of the Court, the Bill cannot be dismissed with Costs to be paid by the Defendant to the Plaintiff (*g*); where the Plaintiff had a Decree *nisi*, and he did not appear afterwards, it was considered as giving up the Judgment, and the Bill was dismissed with Costs (*h*).

Lastly, it should be observed, that formerly a Plaintiff was allowed to give and to abandon three Notices to dismiss, but not a fourth, unless the Costs of the three preceding Notices had been paid (*i*). By a General Order of recent Date (*k*), the Party must now pay the Costs of every Notice, which is not followed up with a Motion, before he can be heard.

(*a*) 2 Cox. 374.

(*b*) 18 Ves. 293.

(*c*) 3 Bro. C. C. 390.

(*d*) 1 Ves. j. 214, 278. 5
Ves. 498.

(*e*) 2 Ves. j. 11.

(*f*) 1 Ves. j. 534.

(*g*) 18 Ves. 395. 3 Meri.
429.

(*h*) Sel. Ca. Ch. 6, 50.

(*i*) 14 Ves. 151.

(*k*) 5 Aug. 1818. 3 Madd. 318.

BILL OF COSTS

FOR

A PLAINTIFF,

Where an Issue was directed on Hearing.

IN CHANCERY.

BETWEEN *Stephen Rudd,*

PLAINTIFF;

AND

John Miller,

DEFENDANT.

MICHAELMAS TERM, 1822.

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
TAKING Instructions for Bill	0	13	4			
Drawing Warrant to prosecute, and Stamp - -	0	7	6			
Drawing Bill and fair Copy, fol. 98 (a) - -	4	18	0			
Fee to Mr. Maddock, to settle and sign, and Clerk -	3	5	6	0	2	6
Attending him - -	0	6	8			
Engrossing Bill -	2	9	0			
Paid for Parchment and Duty	1	10	0			
Paid filing same - -	0	7	4			
Drawing Præcipe for Subpœna, and leaving same at Subpœna Office, and afterwards for Subpœna	0	6	8			
Paid for Subpœna - -	0	8	0			
Writing to Mr. Shaw Vernon, at Stone, instructing him to serve same	0	3	6	0	3	6

(a) The fair Copies is included in the 1s. drawing.

FOR A PLAINTIFF.

625

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Païd him his Bill on that occasion	0	19	6	0	14	6
Païd for Answer, fol. 102	5	19	0			
Making a close Copy for the Country	1	14	0			
Term Fee, Clerk, and Solicitor	0	16	8			
Letters and Messengers	0	5	0			

EASTRE TERM, 1823.

Replication and Duty	0	12	8			
Instructions to move for a Subpœna						
to rejoin, with the usual Directions	0	2	6			
Fee to Mr. Maddock to move	0	10	6			
Attending him, and Register to draw						
up and enter Order	0	6	8			
Païd for Order, Copy, and Service	0	9	0	0	0	6
Païd for Subpœna	0	8	0			
Service of Order and Subpœna on						
the Defendant's Clerk in Court	0	4	6	0	2	0
Abbreviating Bill and Answer, fol.						
98, 102=200	3	6	8			
Two fair Copies thereof for Counsel,						
Sixteen Brief Sheets each	5	6	8			
Instructions for Interrogatories	0	13	4			
Drawing and fair Copy, fol. 23 (a)	1	3	0			
Fee to Mr. Maddock therewith, and						
with a Brief to advise on the neces-						
sary Evidence, &c. and Clerk	3	5	6	1	3	6
Attending him	0	6	8			
Engrossing Interrogatories	0	11	6			
Païd for Parchment and Duty	0	10	0			
Attending the Examiner therewith	0	6	8			
Attending Mr. A. B. examining and						
taking Minutes of his Evidence	0	6	8	0	6	8
The like Attendance on Mr. C. D.	0	6	8	0	6	8

(a) See preceding Observations as to close Copies.

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
The like Attendance on Mr. E. F.	0	6	8	0	6	8
Attending them afterwards to the Examiner instructing him, &c.	0	6	8			
Attending Mr. G. H. several Hours, examining and taking Minutes	0	13	4	0	6	8
Attending him to the Examiner	0	6	8			
Rule to produce Witnesses -	0	8	8			
Rule to pass Publication -	0	8	8			
Term Fee, Clerk and Solicitor	0	16	8			
Letters and Messengers -	0	5	0			

EASTER VACATION, FOLLOWING.

Paid for Six Clerk's Certificate of Pleadings filed - -	0	3	4
Paid setting down Cause, and for Register's Note -	1	5	8
Paid for Subpœna for Judgment	0	8	0
Service thereof (a) -	0	5	0
Drawing and Engrossing Affidavit of Service, Duty, and Oath	0	6	2
Paid filing and Office Copy -	0	5	7
Paid the Examiner's Bill for Plain- tiff's Depositions (b) -	6	8	6
Paid for Copy of Defendant's De- positions - -	5	9	6
Abbreviating the same, fol. 160	2	13	4
Two fair Copies thereof to add to the Briefs, twelve Sheets each	4	0	0
Attending the Plaintiff, advising on the Necessity of proving several			

(a) See preceding Observations as to Service of Subpœna.

(b) The Examiner's Bill must be produced upon the Taxation to shew the Amount, or it cannot be allowed in Costs.

FOR A PLAINTIFF.

627

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Letters <i>vivâ voce</i> , at the Hearing, and for the Name of a Person who could prove the Defendant's Hand Writing thereto -	0	6	8			
Drawing Instructions for Order to Examine to move <i>vivâ voce</i> at the Hearing - -	0	5	0	0	2	6
Fee to Mr. Maddock to move Attending him, and Register to draw up and enter Order -	0	10	6			
	0	6	8			
Paid for Order, Copy, and Service	0	13	0	0	1	0

TRINITY TERM, 1823.

Brief and Fee to Mr. Hart and Clerk	10	12	6	2	2	0
Attending him - -	0	6	8			
The like to Mr. Maddock and Clerk	5	7	6	0	2	6
Attending him - -	0	6	8			
Drawing Observations for Counsel, four Brief Sheets -	1	6	8			
Two fair Copies thereof -	1	6	8			
Attending Mr. Hart and Mr. Mad- dock therewith -	0	6	8	0	6	8
Copy, Title, and Prayer of Bill for the Lord Chancellor -	0	2	6			
July 4th, 5th, and 6th. Attending Court, Cause in the Paper, Clerk, and Solicitor - -	2	0	0			
— 9th and 10th. Attending Court, Cause heard, Clerk, and Solicitor, when an Issue directed -	2	0	0			
Paid Court Fees and Officers	0	12	6			
Paid for Copy Minutes -	0	8	0			
Attending Register, settling same	0	13	4			
Paid for Decree - -	6	15	0			
Attending examining and passing same	0	13	4			

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Paid entering Decree -	1	8	0			
Attending to leave Decree to be entered, examining and taking same away -	0	6	8			
Attending the Plaintiff, advising on the Decree, and the Issue, the necessary Evidence to be produced on the Trial thereof, &c. -	0	6	8	0	6	8
Term Fee, Clerk, and Solicitor	0	16	8			
Letters and Messengers -	0	5	0			

IN THE KING'S BENCH.

RUDD against MILLER.

MICHAELMAS TERM, 1823.

Perusing the Decree and Papers in the Cause, as Instructions to draw the Issue directed to be tried	0	13	4			
Drawing same, and fair Copy, fol. 30 (a) -	1	10	0			
Fee to Mr. Chitty and Clerk, to settle -	1	3	6	0	2	6
Attending him -	0	6	8	0	3	4
Making Copy of the Decree directing the Issue -	1	3	4	1	3	4
Making Copy of the Issue for the Defendant's Attorney, fol. 34.	0	11	4			
Attending him therewith, and to settle same -	0	13	4	0	6	8
Engrossing Bill, Parchment, Duty, continuing, and filing -	0	12	2			
Notice of Trial, Copy, and Service	0	3	0			

(a) See preceding Observations on fair Copies.

FOR A PLAINTIFF.

329

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Entering the Issue on the Roll, and paid for the Entries -	1	2	8			
Warrant and Docquet -	0	3	8			
Drawing Placita and Jurata	0	5	0	0	2	0
Engrossing Record, fol. 34 -	0	12	8			
Parchment and Duty -	0	13	6			
Paid Clerk of the Treasury passing Record, and Sealer -	1	16	0			
Fee thereon - -	0	6	8			
Attending advising as to trying the Issue by a special or common Jury - -	0	6	8	0	6	8
Instructions for Counsel to move for a special Jury -	0	2	6			
Fee to him therewith -	0	10	6			
Attending him, and Court -	0	6	8	0	3	4
Paid for Rule - -	0	7	0			
Copy, and Service on the Defen- dant's Attorney - -	0	3	0	0	3	0
The like on the Sheriffs and Master	0	6	0	0	6	0
Attending the Master for an Ap- pointment to name the Jury	0	6	8	0	6	8
Copy and Service of Rule with the Master's Appointment, on the De- fendant's Attorney - -	0	3	0			
The like on the Sheriffs -	0	3	0			
Attending thereon, when the Jury were named - -	0	6	8			
Paid the Master's Fee -	2	2	0			
Paid the under Sheriff attending with the Freeholder's Book	2	2	0			
Paid for a List of the Forty-Eight Copy thereof for Plaintiff	0	5	0			
	0	2	6	0	2	6
Attending him, taking Instructions to reduce the same -	0	6	8			

	CHARGE.			TAX OFF.		
	£	s	d.	£	s	d.
Attending the Master, for his Ap- pointment to reduce the Jury	0	6	8	0	6	8
Copy and Service thereof -	0	4	0	0	1	0
Attending the Appointment reduc- ing the Jury - -	0	6	8			
Paid for a List of Twenty-four	0	2	6			
Copy thereof for Use -	0	2	6	0	2	6
Paid the Sheriff summoning the Jury	2	2	0			
Venire and Fee -	0	10	10			
Returning and attending -	0	5	4			
Special Distringas and Fee -	0	14	0			
Paid returning the same -	0	8	8			
Attending for that Purpose -	0	3	4			
Paid setting down Cause -	0	11	8			
Attending for that Purpose -	0	6	8	0	3	4
Perusing the Proceedings, and at- tending taking Instructions for Brief - -	0	13	4			
Drawing Brief, Twenty-two Sheets	7	6	8			
Attending the Plaintiff, several Hours, reading over and settling the Case, and arranging the Proofs	0	13	4	0	13	4
Attending Fourteen Witnesses, se- verally, examining them, and taking Minutes of their Evidence	2	6	8	2	6	8
Attending William Hale, Esq. ex- amining him as to his Evidence	0	13	4	0	6	8
The like on Mr. Whetham -	0	13	4	0	6	8
Making three Copies of the Brief, Twenty-two Sheets each -	11	0	0			
Drawing Notice to produce Books and Letters, two Copies, and Ser- vice on the Defendant and his Attorney - -	0	6	0			
Three Copies annexed to Brief	0	3	0			

FOR A PLAINTIFF.

631

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
The like of the Defendant's Notice	0	3	0			
Fee to Mr Attorney-General and Clerk, with Brief	12	14	6			
Attending him	0	6	8			
Fee to Mr. Scarlett, and Clerk, with Brief	10	12	6			
Attending him	0	6	8			
Fee to Mr. Chitty, and Clerk, with Brief	6	8	6			
Attending him	0	6	8			
Attending the Counsel severally, to get a Consultation fixed	0	6	8	0	6	8
Attending the Consultation	0	13	4	0	13	4
Fee to Mr. Attorney-General on Consultation	2	2	0	2	2	0
The like to Mr. Scarlett	2	2	0	2	2	0
The like to Mr. Chitty	2	2	0	2	2	0
To Mr. Attorney-General's Clerk and Servant	0	7	6	0	7	6
Five Subpoenas	3	10	0	0	7	6
Subpoena duces tecum	0	14	6			
Twenty Copies to serve	0	1	0			
Service thereof on Nineteen Witnesses	2	7	6			
Conduct Money to Mr. Attorney	2	2	0			
The like to Seventeen other Witnesses	0	17	0			
Writing to Mr. Shaw Vernon, of Stone, inclosing a Subpoena, and instructing him to serve Mr. W. a Witness there	0	3	6			
Paid Mr. Vernon his Bill thereon	0	9	8			
Attending the Witness on his Arrival in Town, taking Minutes of his Evidence	0	6	8			

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Attending Defendant's Solicitor to admit several Matters to save Expence and Trouble, settling Facts to be admitted - -	0	6	8			
Drawing Consent and fair Copy, and attending to sign same	0	6	8			
Attending the Plaintiff, looking out Papers and Writings to produce pursuant to Notice -	0	6	8			
Attending the Defendant's Solicitor for his Office Copies of the Bill and Answer to examine the same, for the Trial (a) -	0	6	8	0	6	8
Examining the Office Copies of the Bill and Answer with the Records, in the Six Clerks' Office, fol. 200 (b) - -	1	13	4			
Paid Clerk in Court thereon	1	13	4			
Paid searching for Records -	0	6	8			
December 7th. Attending Court to get the Cause appointed for Trial	1	0	0	0	6	8
— 10th. Attending for the like						

(a) Where an Answer is required as Evidence in an Action at Law, as upon a Trial at the Assizes, the Court, except in a criminal Case, does not permit the Record itself to go, but an Office Copy, unless Proof of the Signature is necessary, but not where the Action is by a Stranger unconnected with the Suit in Equity. So, Proceedings under a Commission of Bankruptcy brought into the Secretary's Office, are not permitted to be used as Evidence in Actions unconnected with the Commission. *Jervis v. White*, 8 Vcs. 313.

(b) By Lord Erskine's Orders, 1807, the Clerks in Court are allowed for examining all Copies with Record to be used in Evidence for each Examination if 40 Sheets, or under, 6s. 8d. But if more than 40 Sheets, then for examining each Sheet, 2d.

FOR A PLAINTIFF.

633

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Purpose, when Cause appointed for the 13th - -	0	6	8			
Attending Summoning Officer, to give him Notice -	0	6	8	0	3	4
Attending the several Witnesses to give them Notice when the Trial would come on -	0	13	4	0	6	8
Drawing Abstract of Record for the Chief Justice, and fair Copy	0	6	8	0	3	4
— 13th. Attending Court; Cause tried; Verdict for Plaintiff	0	3	4			
Clerk's Attendance to prove the Ser- vice of the Notice to produce, and the Office Copies of the Bill and Answer in Chancery -	0	13	4	0	6	8
Paid Court Fees - -	4	11	0			
Paid the Sheriff summoning the Jury - -	2	2	0			
Paid the Secondary attending to name Tales - -	1	1	0			
Paid the Witnesses for their Loss of Time, and Expences on attending Trial - - -	12	15	0			
Paid the Witness from the Country his Expences and Loss of Time	3	13	6			
Term Fee, Letters and Messengers	0	10	0			
Rule on Postea - -	0	4	6			
Drawing and engrossing Postea	0	6	0			
Paid stamping same -	0	10	0			
Attending at the Stamp Office for that Purpose -	0	3	4			
Paid delivering Postea -	0	0	6			
Term Fee, Letters, and Messengers	0	10	0			
Attending the Master of the King's						

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Bench with the Bill of Costs, for his Taxation of the Costs at Law	0	6	8	0	6	8
Copy of his Appointment to tax, and Service thereof on the Defendant's Attorney -	0	3	0			
Attending thereon, and proceeded, when the Defendant's Attorney required an Affidavit verifying the Payment to the Witnesses, &c. (a) - -	0	6	8			
Attending taking Instructions to draw the Affidavit	0	6	8	0	6	8
Drawing same -	0	6	8			
Engrossing same, Duty, and Oath	0	6	11			
Attending the Master, and for Appointment to proceed -	0	6	8	0	6	8
Copy and Service thereof on the Defendant's Attorney -	0	3	0			
Attending thereon, when the Master finished the Taxation -	0	6	8			
Paid the Master -	2	3	0			
Term Fee, Letters, and Messengers	0	10	0.	0	10	0

IN CHANCERY.

HILARY TERM, 1824.

Drawing and engrossing Petition to set the Cause down on the Equity reserved -	0	8	1	0	1	7
Paid answering the same	1	0	0			

(a) An Affidavit made by the Solicitor in the Cause is not allowed in Costs as a special Affidavit.

FOR A PLAINTIFF.

635

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Paid for Order, Copy, and Service	0	9	0	0	0	6
Attending to draw up and enter Order - - -	0	6	8			
Paid setting down Cause -	0	1	0			
Making Copy of the Decree for the Chancellor, forty Sides, at 8d.	1	6	8			
The like of the Record sent down for Trial, and Postea thereon re- turned, at 4d. -	1	0	0			
Paid on leaving the same	0	5	0			
Attending for that Purpose	0	6	8			
Drawing and engrossing Affidavit of the Service of the Order for set- ting down the Cause, Duty, and Oath -	0	6	7			
Paid filing and for Office Copy	0	5	8			
Attending to file Affidavit	0	14	8	0	14	8
Drawing Brief, six Sheets	2	0	0			
Making two fair Copies, for Counsel	2	0	0			
Fee to Mr. Hart, with former Brief and Clerk -	8	10	6			
Attending him -	0	6	8			
Fee to Mr. Maddock and Clerk	5	7	6			
Attending him -	0	6	8			
February 18th. Attending Court ; Cause in the Paper -	0	13	4			
——— 19th. The like Clerk and Solicitor, Cause heard	1	0	0			
Paid Court Fees, and Officers	0	12	6			
Paid for Copy Minutes -	0	6	0			
Perusing and attending settling them	0	13	4			
Paid for Order -	2	1	6			
Attending, examining, and passing	0	13	4			
Paid entering - -	0	7	6			

BILL OF COSTS

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Attending to leave Decree to be entered, examining and taking same away -	0	6	8			
Term Fee, Clerk, and Solicitor	0	16	8			
Letters and Messengers -	0	5	0			
HILARY VACATION, FOLLOWING.						
Copy of the Order for the Master	0	5	0	0	2	6
Taking Instructions to draw Interrogatories for the Examination of the Defendant -	0	13	4			
Drawing and fair Copy, fol. 10	0	10	6			
Warrant on leaving Copy and Service	0	4	0			
Warrant to settle Copy and Service	0	4	6			
Attending thereon, Interrogatories allowed -	0	6	8			
Paid for the Master's Certificate of Allowance, transcribing, &c.	2	1	0			
Paid filing and for Office Copy	0	5	10			
Attending filing, and afterwards for Copy -	0	6	8			
Paid the Master's Clerk engrossing the Interrogatories, Parchment, and Duty -	1	0	0	0	8	6
Paid for a Copy of the Defendant's Examination, fol. 64 -	3	14	8			
Abbreviating the same -	1	1	4			
Perusing same to see if sufficient	0	6	8	0	6	8
Drawing Charge and fair Copy for the Master, fol. 26. -	0	17	4			
Warrant on leaving, Copy, and Service	0	4	6			
March 2nd. Warrant to proceed, Copy, and Service -	0	4	6			
Attending thereon, and proceeded	0	6	8			

FOR A PLAINTIFF.

687

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Another Warrant to proceed thereon, Copy, and Service -	0	4	6			
Attending thereon, when the Master allowed the Charge -	0	6	8			
Paid for a Copy of the Defendant's Discharge, fol. 18 -	0	9	0			
Making a Copy thereof, for the Plaintiff -	0	6	0	0	6	0
Attending him, advising thereon	0	6	8	0	6	8
March 10th. Attending a Warrant on the Discharge, and proceeded	0	6	8			
——— 12th. Attending another Warrant, when the Discharge allowed -	0	6	8			
Paid for a Copy of the Master's Re- port, fol. 56 -	1	8	0			
Warrant on preparing same, Copy, and Service -	0	4	6			
Making a Copy of the Report	1	17	4	0	18	8
Warrant to settle, Copy, and Ser- vice -	0	4	6			
Attending thereon, when the Report settled -	0	6	8			
Drawing Bill of Costs, and Copy, fol. 55 -	1	16	8			
Warrant on leaving, Copy, and Ser- vice -	0	4	6			
Two Warrants to tax, Copies, and Service -	0	9	0			
Attending thereon, Clerk in Court and Solicitor; but upon an Ob- jection made by the other Side the Master refused to allow the Clerk in Court's Attendance, as he had not <i>personally</i> attended	1	6	8	0	13	4

BILL OF COSTS

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Warrant to sign Report, Copy, and Service -	0	4	6			
Attending examining Transcript with the Master's Draft of his Report -	0	6	8			
Paid for Report and transcribing	1	19	2			
Gave Master's Clerk -	8	8	0			
Paid filing, and Office Copy	2	12	0			
Attending to file Report, and afterwards for Copy -	0	6	8			
Paid for Subpoena, for Costs and personal Service (conditional)	0	13	0			
Term Fee, Clerk, and Solicitor	0	16	8	0	16	8
Letters and Messengers -	0	5	0	0	5	0

BILL OF COSTS .

FOR THE

DEFENDANT.

JOHN MILLER, Esquire,

To J. WILLIAMS, DEBTOR.

		CHARGE.			TAX OFF.		
		£	s.	d.	£	s.	d.
1822.	} ATTENDING you on						
Oct. 9th	} taking Instructions to						
defend	- -	0	13	4	0	6	8
Drawing Warrant to defend, and paid							
Stamp	- -	0	7	6			
Retainer to Mr. Solicitor-General for							
you and Clerk	-	1	3	6			
Attending him	-	0	6	8			

YOURSELF *at the Suit of* RHUDE.

MICHAELMAS TERM, 1822.

Paid entering Appearance	-	0	6	8			
Paid for Office Bill, fol. 98	-	5	14	4			
Attending, conferring, and advising							
thereon	- -	0	6	8			
Instructions to Counsel to move for							
a Month's Time to answer		0	2	6			
Fee to Mr. Roupell to move		0	10	6			
Attending him and Register to draw							
up and enter Order	-	0	6	8			
Paid for Order, Copy, and Service		0	9	0	0	0	6

MICHAELMAS VACATION, FOLLOWING.

Drawing Petition to the Master of

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
the Rolls for three Weeks further Time to answer, engrossing, and Duty -	0	4	7			
Paid answering -	0	5	6			
Paid for Order, Entry, Copy, and Service -	0	9	0	0	1	0
Attending Register to draw up and enter Order -	0	6	8			
January 10th. Attending you the greatest Part of this Day, taking Instructions for Answer	0	13	4			
——11th. The like Attendance on you this Day -	0	13	4	0	6	8
Drawing Answer, and fair Copy, fol. 102 -	5	2	0			
Making fair Copy thereof for Coun- sel, to settle and sign same (a)	1	14	0	1	14	0
Fee to Mr. Wingfield and Clerk, therewith -	4	6	6			
Attending him - -	0	6	8			
Attending you, reading over and settling the Draft of the Answer	0	13	4			
Engrossing same -	2	11	0			
Paid for Parchment and Duty, two Skins -	1	3	8			
Attending you reading over the En- grossment -	1	6	8			
Attending you to the Public Office, to swear your Answer -	0	13	4	0	6	8
Paid Oath - -	0	1	0			
Paid filing Answer -	0	3	4			
Term Fee, Clerk and Solicitor	0	16	8			
Letters and Messengers -	0	5	0			

(a) The Copy is included in the 1s. per Sheet drawing.—*Ed.*

EASTER TERM, 1822.

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Paid for Office Copy Replication	0	3	6			
Abbreviating Bill and Answer, fol. 98, 102=200	3	6	8			
Two Copies for Counsel, Sixteen Sheets each	5	6	8			
Instructions for Interrogatories	0	13	4			
Drawing same, fol. 12	0	12	0			
Fair Copy thereof for Counsel to settle and sign (a)	0	4	0	0	4	0
Fee to Mr. Roupell, and Clerk, therewith, and Brief of the Plead- ings, to advise on Evidence, &c.	3	5	6			
Attending him	0	6	8			
Engrossing the Interrogatories	0	6	0			
Paid for Parchment and Duty	0	9	0			
Attending the Examiner therewith	0	6	8			
May 14th. Attending advising on the necessary Evidence in the Cause, and when the Witnesses should be examined	0	13	4	0	6	8
—— 16th. Attending Mr. James, taking Minutes of his Evidence, and attending with him to the Examiner	0	13	4	0	6	8
The like Attendance on Mr. Simpson	0	13	4	0	6	8
——. Attending Mr. Ryley, exa- mining and taking Minutes of his Evidence, and attending him to the Examiner	0	13	4	0	6	8
——. The like Attendance on Mr. Smith, Mr. Wilbraham, and Mr. Jones	0	6	8			

(a) See preceding Observations as to Copies.

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Attending you this Day, perusing Letters and Papers, to see what further Evidence they afforded, and advising thereon -	0	13	4	0	6	8
Instructions for Counsel to move to enlarge Publication for a Week	0	2	6			
Fee to Mr. Roupell to move	0	10	6			
Attending him and Register to draw up and enter Order -	0	6	8			
Paid for Order, Copy, and Service	0	9	0	0	0	6
Attending you on being served with the Subpoena to hear Judgment, and advising on the Propriety of entering into further Evidence	0	6	8	0	6	8
Paid the Examiner's Bill (a)	6	11	7			
Paid for Office Copy of the Plain- tiff's Depositions -	9	6	8			
Abbreviating the same, fol. 160	2	18	4			
Making two fair Copies thereof, to add to the Briefs of the Pleadings for Counsel, twelve Sheets each	4	0	0			
Term Fee, Clerk, and Solicitor	0	16	8			
Letters and Messengers -	0	5	0			

TRINITY TERM, 1822.

Fee to Mr. Solicitor General, and Clerk, with Brief -	10	12	6			
Attending him -	0	6	8			
Fee to Mr. Roupell, and Clerk, with Brief -	5	7	6			
Attending him -	0	6	8	0	6	8
Instructions for Counsel to move for						

(a) This must be produced at the Taxation, if it is not it will be disallowed.

FOR THE DEFENDANT.

648

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Order to prove Letters <i>viva voce</i> , at the Hearing -	0	2	6			
Fee to Mr. Roupell to move	0	10	6			
Attending him and Register to draw up and enter Order -	0	6	8			
Paid for Order, Copy, and Service	0	13	0			
Writing to you on the Necessity of proving the above Letters, and desiring the Person to be sent who could prove the Hand-writing	0	8	6			
July 9th and 10th. Attending the Hearing of the Cause, Clerk in Court, and Solicitor, when an Issue was directed -	2	0	0			
Paid Court Fees and Officers	0	13	0			
Paid for a Copy of the Minutes	0	8	6			
Perusing and attending, and settling them -	0	13	4			
Attending you, advising on the De- cree, and the Issue directed	0	6	8			
Term Fee, Clerk, and Solicitor	0	16	8			
Letters and Messengers -	0	5	0			

IN THE KING'S BENCH.

MICHAELMAS TERM, 1821.

Perusing a Draft of the Issue, and settling the same -	0	6	8			
Making a Copy thereof for Use, fol. 34 (a) -	0	11	4	0	11	4
Paid for Issue, Duty, and entering Plea -	0	18	2			
Attending to search if the Cause was set down to be tried -	0	3	4			

(a) Not allowed in strict Costs.

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
The Plaintiff having obtained a Rule for a special Jury, attending Appointment to name the Jurors	0	6	8			
Paid for a Copy of the List of Forty-eight	0	2	6			
Making a Copy thereof for you (a)	0	2	6	0	2	6
Attending you therewith, taking Instructions to reduce the Forty-eight	0	6	8	0	3	4
Attending the Appointment, reducing the Jury	0	3	4			
Paid for a List of the Twenty-four	0	2	6			
Perusing the Papers in the Cause in Chancery, and other Letters and Papers, as Instructions to draw Brief	0	13	4	0	6	8
Attending you, advising, and taking further Instructions	0	6	8	0	3	4
Attending Mr. A. B. a Witness, examining, and taking Minutes of his Evidence	0	6	8	0	3	4
The like Attendance on Ten other Witnesses, which took up a great deal of my Time	3	6	8	1	0	0
Drawing Brief, twenty-eight Sheets	9	6	8			
Attending you, reading over, and settling the same	0	13	4			
Making three fair Copies thereof for Counsel	14	6	8	0	6	8
Fee to Mr. Solicitor General therewith, and Clerk	12	14	6			
Attending him	0	6	8			
Fee to Mr. Marriott, and Clerk, with Brief	10	12	6	0	2	6

(a) Not allowed in strict Costs.

FOR THE DEFENDANT.

645

	CHARGE.			TAX OFF.		
	£	s	d.	£	s.	d.
Attending him -	0	6	8	0	6	8
Fee to Mr. Gurney, and Clerk, with Brief -	6	8	6	0	2	6
Attending him -	0	6	8	0	6	8
Six Subpœnas -	3	15	0	0	12	6
Two Subpœnas duces tecum	1	9	0	0	14	6
Twenty Copies to serve -	1	0	0			
Service of the Subpœnas on Seventeen Witnesses -	2	2	6			
Conduct Money to the Witnesses	0	17	0			
Drawing Notice to produce Books, Papers, &c. on the Trial, two Copies, and Service on the Plaintiff and his Attorney -	0	7	0	0	3	0
Attending you on Plaintiff's Notice, for the Production of Books and Papers, &c. on the Trial, looking out the same -	0	6	8	0	3	4
Making three Copies of the Notices for the Counsel -	0	6	0	0	3	0
Dec. 10th. Attendance this Day, when the Cause was appointed for the 13th -	0	6	8	0	3	4
— 13th. Attending the Court, when the Cause was tried, and a Verdict given for the Plaintiff	0	13	4			
Paid Court Fees -	2	9	0			
Paid the Witnesses for their Expences and Loss of Time on attending the Trial -	8	19	4			
Term Fee, Letters, and Messengers	0	10	0			

IN CHANCERY.

HILARY TERM, 1823.

The Plaintiff having having set down

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Cause on the Equity reserved, drawing Brief, Six Brief Sheets	2	0	0			
Making two fair Copies thereof for Counsel	2	0	0			
Fee to Mr. Solicitor General, and Clerk, with Brief	5	7	6			
Attending him	0	6	8			
Fee to Mr. Roupell, and Clerk, with Brief	3	5	6	0	2	6
Attending him	0	6	8			
February 18th. Attending Court, Cause in the Paper, but not called on	0	13	4			
Feb. 9th. The like Attendance, Cause heard, Clerk in Court, and Solicitor	1	0	0			
Paid for Copy Minutes	0	6	0	0	1	0
Perusing and attending the Register settling the same	0	13	4			
Term Fee, Clerk, and Solicitor	0	16	8			
Letters and Messengers	0	6	0	0	1	0

HILARY VACATION, FOLLOWING.

Paid for a Copy of the Plaintiff's Interrogatories, fol. 10	0	6	8			
Attending a Warrant on the Inter- rogatories, and settling same	0	6	8			
Attending taking Instructions for your Examination	0	13	4			
Perusing Papers and Vouchers as further Instructions	0	13	4	0	6	8
Drawing the Examination, fol. 64	3	4	0			
Attending you, reading over and settling the same	0	13	4			

FOR THE DEFENDANT.

647

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Fee to Mr. Roupell, to settle same, and Clerk -	2	4	6			
Attending him -	0	6	8			
Engrossing same -	1	12	0			
Paid for Parchment and Duty	0	10	8			
Attending you reading over the In- grossment - -	0	13	4			
Attending you to the Master's Cham- bers, to procure you sworn thereto	0	6	8			
Paid Oath - -	0	1	0			
Paid on leaving -	0	5	0			
March 1st. Paid for a Copy of the Plaintiff's Charge, fol. 26	0	13	0			
—— 4th. Attending a Warrant thereon, and proceeded	0	6	8			
—— 8th. Attending another Warrant thereon, when the Charge was allowed -	0	6	8			
Drawing your Discharge, fol. 18	0	12	0			
Warrant on leaving same, Copy and Service - -	0	4	6			
—— 12th. Attending thereon, when the Charge was allowed	0	6	8			
Paid for Office Copy of Draft Re- port, fol. 56 - -	1	8	0			
Making a Copy thereof for you (a)	0	18	8	0	18	8
Attending, reading over, and ad- vising thereon -	0	13	4	0	6	8
Attending a Warrant on the Report, when the same was settled	0	6	8			
Paid for a Copy of the Plaintiff's Costs, fol. 55 -	1	7	6			

(a) Not allowed in strict Taxation.

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Attending two Warrants, taxing the Costs in Chancery, Clerk in Court, and Solicitor; but Mr. Stephen re- fused to allow the Clerk in Court's Attendance, the Clerk in Court attending by Agent, and not in Person - - -	1	6	8	0	13	4
Attending two Appointments of the Master of the King's Bench, tax- ing Costs at Law -	0	13	4	0	6	8
Attending you for the Money re- ported due to the Plaintiff, and for the Costs of the Suit; and at- tending the Plaintiff's Solicitor, settling the Business with him	0	13	4	0	6	8
Drawing and engrossing a Release from the Plaintiff to you in con- sequence - - -	1	1	0			
Paid for Stamp, &c. -	0	0	0			
Attending the Execution thereof	0	6	8			
Term Fee, Clerk, and Solicitor	0	16	8	0	16	8
Letters and Messengers -	0	6	0	0	6	0

*Plaintiff's Costs of Motion for a new Trial of the
former Issue.*

EASTER TERM, 1822.

THE Defendant having given a Notice of Motion that a new Trial might be had at Law, draw- ing Brief for Counsel to oppose same, Six Brief Sheets -	2	0	0
Making three fair Copies thereof for Counse - - -	3	0	0

A MOTION.

649

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Fee to Mr. Attorney-General, and Clerk, therewith -	5	7	6			
Attending him - -	0	6	8			
Fee to Mr. Hart, and Clerk, with Brief - -	4	6	6			
Attending him - -	0	6	8	0	6	8
Fee to Mr. Maddock, and Clerk, with Brief - -	5	7	6			
Attending him - -	0	6	8	0	6	8
April 6th. Attending Court, when the Motion was directed to stand over till the 14th -	0	13	4			
— 14th. Attending Court, when the Attorney-General and Mr. Hart were heard in Support of the Motion - -	0	18	4			
— 16th. The like Attendance, when Cause was shewn against the Motion, and the Court refused to grant a new Trial, and the Application dismissed with Costs - -	0	13	4			
Paid for Order, Copy, and Service	0	9	0	0	1	0
Drawing Bill of Costs, and Copy, fol. 18 - - -	0	12	0			
Warrant on leaving Copy, and Service - - -	0	4	6			
Warrant to tax, Copy, and Service	0	4	6			
Attending taxing, Clerk, and Solicitor - - -	0	13	4			
Paid for Report of Costs -	2	1	6			
Paid filing, and for Office Copy	0	4	10			
Attending the Master for Certificate, and filing same -	0	6	8			

		CHARGE.			TAX OFF.		
		£	s.	d.	£	s.	d.
Paid for Subpoena, and personal							
Service (conditional)	-	0	11	0			
Letters and Messengers	-	0	5	0	0	5	0

The Defendant's Bill on the above Motion.

EASTER TERM, 1822.

Attending you advising on the Propriety of making an Application to the Court for a new Trial, which you directed	-	0	13	4	0	6	8
Notice of Motion, Copy, and Service	-	0	5	0	0	1	0
Drawing and engrossing Affidavit of the Service, and Oath	-	0	7	1			
Paid filing, and Office Copy	-	0	6	2			
Drawing Brief for Counsel, seven Sheets	-	2	6	8			
Making four fair Copies thereof for Counsel	-	4	13	4			
Four Copies of Notice to annex Fee to Mr. Solicitor-General, and Clerk, with Brief	-	0	4	0	0	2	0
Attending him	-	5	7	6			
The like to Mr. Scarlett, Clerk, and Attendance	-	0	6	8			
Fee to Mr. Gurney, and Clerk, with Brief	-	5	14	2			
Attending him	-	3	5	6			
Fee to Mr. Selwyn, and Clerk, with Brief	-	0	6	8			
Attending him	-	3	5	6			
Attending him	-	0	6	8			

A MOTION.

651

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
April 6th. Attending the Court, when the Motion was directed to stand over till the 14th, in Order to give Time for the Judge who tried the Cause making his Re- port thereof - -	0	13	4			
—— 14th. Attending Court on Motion, when the same was Part heard - -	0	13	4			
—— 16th. Attending the Court, when Motion fully heard, and the Application dismissed with Costs	0	13	4			
Attending Taxation of the Defend- dant's Costs on Motion, Clerk and Solicitor - -	0	13	4			
Paid for Copy of Plaintiff's Costs, fol. 18, - -	0	9	0			
Letters and Messengers -	0	5	0			

PRACTICAL OBSERVATIONS

AND

REMARKS.

THE Lord Chancellor may take upon himself in the first Instance, with the Exceptions after mentioned, to decide any Question of Law or of Fact, put in Issue upon the Record (*a*); but, as Lord Eldon has observed, the original Jurisdiction of Courts of Equity to determine Questions of Fact, without the Intervention of a Jury, whose Aid is sought, for the Purpose of informing the Conscience of the Court, ought to be exercised according to a sound Discretion (*b*); a Refusal therefore, to send the Cause to a Jury, has been held a just Ground of Appeal, if the Court of Appeal should think that the contrary Decision would have been a sounder Exercise of Discretion; but it is a competent Exercise of the Authority and Duty of the Court, in and throughout every Case, and in every Stage to determine according to its Discretion, whether it does or does not want that Assistance (*c*): it is not the Principle of a Court of Equity merely because there is a Question of Fact, which may be tried by Jury, to send it to a Jury to be tried (*d*); the Object of an Issue out of a Court of Equity is to satisfy the Conscience of the Court, as to disputed Facts: if the Court can sufficiently collect the Inference from the Evidence taken in the Cause, no Issue is necessary; but as the noble and learned Judge expresses, the Right of the Court ought to be sparingly and tenderly used in deciding upon Facts without an Issue (*e*). The Cases forming the Exception before alluded to, are those of an Heir at Law, controverting the Validity of a Will of Lands (*f*); and of a Rector or Vicar

(*a*) 6 Ves. 671.(*e*) 9 Ves. 168.(*b*) 3 Ves. and Bea. 42.(*f*) 7 Bro. P. C. 437. 11(*c*) 2 Madd. Cha. 475.

Ves. 53.

(*d*) 4 Dow. 329.

suing as sole Plaintiff for Tythes (*a*): either of these is entitled as a Matter of Right, to insist upon an Issue at Law to decide their Claims.

The Cases of most ordinary Occurrence where Issues are directed, are those to try the due Execution and Consideration, and the reality of Deeds and Conveyances (*b*); a Will of Lands is never set aside without an Issue *Devisavit vel non* (*c*); to try the Validity and Existence of an Agreement to carry on an illegal Game, and a Contribution for that Purpose, an Issue has been directed (*d*): by a covenant to settle a particular Estate, the Breach is Matter of Damage; an Issue will be directed to try what that Damage is (*e*); to prove the Fact of a Partnership, an Issue if prayed is seldom refused (*f*): and so to decide the Existence of a Modus in a Tythe Cause: to try the Amount of a Legacy, from a Doubt as to a Figure, an Issue has been directed, instead of a Reference (*g*), and the like in arguing Exceptions upon Facts before a Master (*h*); so to discover the Interest of a suspected Witness examined in the Cause (*i*). In some Cases, the Court considers it more conducive to Justice to direct an Action at Law (*k*): where, for Instance, the Question turns upon a Contract; as whether a Bill of Exchange was usurious (*l*); and so where literary Property is in dispute, what Damage the Proprietor has sustained by Sale of a pirated Work (*m*).

The Court is not in the habit of directing an Issue upon Motion on the coming in of the Defendant's Answer, the regular Course is upon Hearing the Cause (*n*); but Cases

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|--|---|
| (<i>a</i>) 3 Bl. Com. 452. 4 Price.
14, 160. | (<i>g</i>) 4 Ves. 796. |
| (<i>b</i>) 2 Ves. 216. | (<i>h</i>) 2 Ves. 579. |
| (<i>c</i>) 11 Ves. 53. 7 Bro. P. C.
437. 3 Meri. 161. 1 Turn.
R. 49. | (<i>i</i>) 3 Bro. C. C. 228. |
| (<i>d</i>) 1 Eden. 378. | (<i>k</i>) 6 Ves. 193. |
| (<i>e</i>) 1 Bro. C. C. 363. | (<i>l</i>) 1 Ves. 543. 2 Ves. 246.
2 Dougl. 735. |
| (<i>f</i>) 16 Ves. 53. | (<i>m</i>) Selwyn v. Bridgman,
Tri. 1809, MSS. |
| | (<i>n</i>) 18 Ves. 481. |

occur where the Court by an interlocutory Order directs an Issue previous to the Hearing; and in all Cases where an Issue is directed, great Care and Attention is required, so to frame the Question to be tried, that it may embody the Whole of the subject Matter of Enquiry, and that it be submitted by the Judge in his Direction to the Jury, in the View the Court intended it to be taken, with all its Bearings and Specialties, unfettered with Technicality or Formulæ of Pleadings. An Author of distinguished Merit considers the frequent occurrence of Questions upon Issues, being sent to a Jury wide of the Point, as a necessary Consequence flowing out of the different Habits of Investigation, which prevail in Courts of Law and of Equity, from the Judge at Law not being apprized of the View with which the Issue was directed (*a*); and Lord Eldon has frequently expressed his Disapprobation of the Course taken in the Courts of Law upon the Trials of Issues; and recently in *Beer v. Ward*, his Lordship expressed in very strong Language, his great disappointment at the Result of the Issue there directed, and the very slovenly Manner in which the main Question sent down for Trial, had been passed over untouched and untried.

The Order directs where the Issue is to be tried, either at the Sittings at Nisi Prius in London or Middlesex in or after Term, in the Court of King's Bench or Common Pleas, or at the Assizes and in what County: to try an Issue in the Exchequer, a special Ground must be laid, and an Order upon Notice obtained (*b*); a *Trial at Bar*, the solemnity of which, and the great length of Examination, has great weight with the Court (*c*), is seldom directed but in Questions upon large Estates: where the Party applying consented to take Nisi Prius Costs, Lord Hardwicke directed a Trial at Bar (*d*). The Order directs who shall be Plaintiff and who shall be Defendant: but a

(*a*) 2 Madd. Cha. 476.

(*b*) 5 Madd. 3.

(*c*) 2 Atk. 378.

(*d*) 3 Atk. 546. 1 Ves. 28.

Work of authority lays it down, that the Party who is to sustain the Affirmative is to be Plaintiff, and as such has the Choice of the Court in which it is to be tried (*a*). The special Matter to be given in Evidence, admitted or produced, is also directed : in some Cases the Plaintiff or Defendant or both, are ordered to attend and be examined upon the Trial ; but Liberty for one Party to examine the other is not of course, it cannot be ordered unless consented to (*b*) : No Objection is waived by it, but that which arises from his being a Party in the Cause (*c*) ; but in general, the Court will not order the Examination of Persons at the Trial, who by the Rules of the Courts of Law, could not be examined without such Order, except in Cases where the Facts in Dispute rest only in the Knowledge of the Plaintiff or Defendant (*d*). The Records of the Pleadings in Chancery ought not in strictness to be sent down to the Assizes until after Refusal of the Office-Copies as Evidence : where an Answer is required to be produced in Evidence, at the Assizes, the Court, except in a criminal Case, does not permit the Record to be taken down, but an Office-Copy examined with the original Record, unless the Proof of Signature to the Answer is required : in an Action by a mere Stranger, unconnected with the Suit in Equity, Lord Eldon would not suffer the Record to be taken out of the Chancery Office for any Purpose (*e*). Usually the Order directs the Depositions of deceased Witnesses examined in the Cause, or of those who are proved from their State of Health incapable of attending, to be read in Evidence at the Trial (*f*) ; and an Order for the like Purpose may be obtained in an Action at Law directed by the Court (*g*) : without an Order to make the Depositions Evidence, the whole Record of Bill, Answer, Replication, and other Pro-

(*a*) 2 Rose 27.

(*b*) 1 Ves. and Bea. 374.

(*c*) 1 Swanst. 40.

(*d*) 1 Buck. 234.

(*e*) 1 Ves. 152. 8 Ves. 313.

(*f*) 15 Ves. 176. 1 Ves. and Bea. 339. n.

(*g*) 1 Ves. and Bea. 335.

ceedings must be produced and proved (*a*). Recently an Order directing Depositions to be read in Evidence, reserved to the Defendant Liberty to examine the Witnesses upon Interrogatories in the mean Time (*b*). An Application to read the Depositions of Witnesses on the Trial of an Issue at Law, directed by the Court of Chancery, on the Ground of Age or Incapacity to attend in Person, must be supported by Affidavit, and made to the Judge at the Trial, and not to the Court which directs the Issue (*c*): and where a Deposition *de bene esse*, (to the taking of which any Irregularity of any Kind might have been effectually objected before the Hearing of the Cause) has been read at the Hearing, it is of course (if any Issue is directed) to order it to be read at the Trial, and the Court will not afterwards discharge the Order for reading the Deposition on the Ground of Irregularity in taking the Deposition; although the Party complaining of the Order, did not know of the Irregularity in Question till after the Hearing; and although the Time was very short between the publishing the Deposition and the Hearing of the Cause: the Reason assigned is, that the Party might have applied for Time to examine, whether the Depositions published had been regularly taken; where one of the Commissioners from Interest might have been objected to (*d*). On the Trial of an Issue, *devisavit vel non*, all the Witnesses to a Will must be examined, if living, for they are the Witnesses of the Court, and not of one Party or the other, for the Issue is Part of the Proceedings of the Court (*e*); and Lord Eldon has decided, that in proving the Execution of a Devise, *actual Signature* by the Devisor, in the Presence of the three Subscribing Witnesses, is not required, if he declares it to be his Will before those who did not see him sign (*f*): where Land is

(*a*) 1 Ves. and Bea. 343.
1 Phill. Ev. 296.

(*b*) 1 Ves. and Bea. 242.

(*c*) 1 Cox. 184.

(*d*) 1 Swanst. 66. 1 Wils.
C. C. 155.

(*e*) Coop. 136.

(*f*) 1 Ves. and Bea. 362.

in Question, the Court sometimes makes an Order for the Jury to have a View ; and if directed of a particular Part of a Manor, the Order will be extended to a View of the whole Manor, and to ascertain the Boundaries (*a*). If the Parties are desirous of trying the Issue by a *special Jury*, an Application for that Purpose must be made to the Court of Chancery, or for Costs incurred for not going to Trial (*b*) ; and if the Issue be not tried, and no Notice given, it will be directed to be tried at the next Assizes, or taken *pro confesso* (*c*) ; but the probable Absence of Counsel has been held sufficient Ground for obtaining Leave to postpone the Trial of an Issue (*d*), and the Judge at *Nisi Prius*, may put off the Trial (*e*). Special Matter should be indorsed on the Postea.

To carry the Order directing the Issue into Effect, the Order (which is always interlocutory) with the leading Counsel's Brief, should be left with a special Pleader or a practising Barrister, with full Instructions to prepare and settle a Draft of the Issue directed by the Court, a fair Copy of which, when settled, must be delivered over to the adverse Solicitor ; and if Objections are taken to the Draft, they are usually disposed of at a Meeting by Appointment with the Counsel on each Side : if the Parties differ so as to require the Decision of the Master, the Party prosecuting the Issue must leave a Copy of the Order, and of the Draft of the Issue at the Master's Office. A Warrant *on leaving the Issue*, and successive Warrants *to settle the Issue* must be taken out and served upon the adverse Clerk in Court ; the Question to be put in issue and submitted to the Jury, is embodied in the Order, *in hæc Verba* : the Master having no Authority to vary or alter the Order, any Alteration or Variation in the latter, must be obtained by special Motion, or by Petition, either to the Court or to the Master of the Rolls, by whom the Order was made ; and if upon this Application any Order varying the former Order is made, it must

(*a*) 2 P. Wms. 68.

(*c*) 4 Madd. 255.

(*b*) 2 P. Wms. 68. Pra.

(*d*) 1 Ja. and Wa. 225.

Reg. Wy. Ed. 264.

(*e*) 4 Campb. 163.

ceedings must be produced and proved (a).

Order directing Depositions to be read in

served to the Defendant Liberty to examine

upon Interrogatories in the mean Time

tion to read the Depositions of Witnesses

an Issue at Law, directed by the Court

Ground of Age or Incapacity to attend

supported by Affidavit, and made

and not to the Court which directs

a Deposition *de bene esse*, (b)

Irregularity of any Kind might

jected before the Hearing of

the Hearing, it is of course

order it to be read at

afterwards discharge the

the Ground of Irregularity

the Party complaining

Irregularity in Question

the Time was very

sition and the Issue

is, that the Plaintiff

whether the Plaintiff

where one Plaintiff

been objected to

vel non, a Verdict for the Plaintiff (d);

living, or by Order draw it up, will not,

one of the Refusal order the Matter directed to be

ings or to be taken *pro Confesso*; or if the Party

in according to the Order, the Court will order it

to be amended. Where an Issue was directed,

the Plaintiff's Solicitor obtained an Order

with the Name of the Plaintiff, and to make use of

as a Witness, and had a Verdict, the Court of Chancery

the Verdict for this Surprise upon the Defendant (e).

(a) *Prac. Reg. Wy. Ed.* 162.

(b) *Vol. 2. Title, Issue.*

(c) *5 Moore, 473.*

(d) *Dick. 521.*

(e) *2 Ch. Ca. 80.*

we have adopted a Practice where a Dis-
 crepancy is a mere Question of Law, and
 determined there, by interlocutory Orders
 or to give a Party Liberty to
 reserve the Consideration of all
 Verdict (a). If an *Action*
 Directions given, and it
 were the Master to settle
 the like Proceedings
 and the Course of
 is brought, must
 to further Pro-
 ceedings by the
 Court instituted: it
 directions, or on the
 Issue; and if an Action
 of the Court of Chancery
 Objection taken at the Trial, the
 Court make the Party taking the Objection
 ; and in the Course of an Action brought
 direction of the Court, if the Mode is miscon-
 ceived the Party should apply by Petition, to enable the
 Court to do complete Justice (c). If either Party is dissa-
 tisfied with the Verdict, he may move for a *new Trial*; but
 in an Action and an Issue directed by the Court, the Prac-
 tice varies. Lord Eldon laid it down as a General Rule of
 Practice, that in an *Action at Law*, directed by the Court,
 the Application for a new Trial, must be to the Court in
 which it was tried, till they are satisfied with the Verdict,
 and that the Rule was not affected by any special Provi-
 sions, by which the Direction of the Action is accompanied;
 but that in an *Issue*, the Motion for a new Trial must be made
 to the Court of Chancery (d): in the latter Case it would

(a) 4 Bro. P. C. 700.

(c) 1 Cox, 143.

(b) Peake, 69. 4 Ves. 71.

(d) Coop. 96. 2 Rose, 178.

4 Madd. 214. 2 Hullock, 626. 4 Mau. and Sel. 192.

be drawn up and left at the Master's Office, and the usual Warrants taken out and attended. When the Master has settled the Draft of his Report, which requires no Confirmation, it must be signed by him and filed at the Report Office. The Form of the Issue being settled, which is by a Declaration in Case in a feigned Action (*a*), that the Plaintiff laid a Wager of five Pounds with the Defendant, that Peter Brooke was Heir at Law to Ralph Leycester, and then averring that he is so, brings his Action for the five Pounds; the Defendant admits the Wager, but avers that Peter Brooke is not Heir to Ralph Leycester, and Issue is thereupon joined (*b*). The Issue must be made up and delivered to the adverse Solicitor, and the Proceeding, and the subsequent Proceedings from the Delivery and Entry of the Issue in the Court of Law, are the same as if the Cause had originally commenced there, until a Verdict is obtained, and the Cause brought on for further Directions, or on the Equity reserved. A Defendant may carry the Record of an Issue directed by the Court to Trial, if the Plaintiff endeavours to delay it (*c*); and if the Plaintiff gives Notice of Trial, and does not countermand in Time, the Court of Chancery will on Motion give Costs; and so if an Issue is directed, and the Defendant neglects to proceed, the Court will order him to do it in four Days, or the Issue to be taken as tried, and a Verdict for the Plaintiff (*d*); or if the Party that should by Order draw it up, will not, the Court will upon Proof of the Refusal order the Matter directed to be put in Issue, or to be taken *pro Confesso*; or if he draw it up, but not according to the Order, the Court will order it to be settled and amended. Where an Issue was directed, and the Plaintiff's Solicitor obtained an Order *ex Parte*, to strike out the Name of the Plaintiff, and to make use of him as a Witness, and had a Verdict, the Court of Chancery set aside the Verdict for this Surprize upon the Defendant (*e*).

(*a*) Prac. Reg. Wy. Ed. 162.

(*d*) Dick. 521.

(*b*) Vol. 2. Title, Issue.

(*e*) 2 Ch. Ca. 80.

(*c*) 5 Moore, 473.

Courts of Equity have adopted a Practice where a Dispute between the Parties is a mere Question of Law, and must ultimately be determined there, by interlocutory Orders either to direct an Issue, or to give a Party Liberty to bring an Action at Law, reserving the Consideration of all further Directions till after the Verdict (*a*). If an *Action at Law* be directed, and special Directions given, and it should be found necessary to go before the Master to settle the Question directed to be tried; the like Proceedings must be pursued as in settling an Issue, and the Course of Practice in the Court of Law in which it is brought, must be followed until a Verdict is obtained; but no further Proceedings in Execution of the Verdict, unauthorized by the Court of Chancery, by whose Order it was instituted: it must be brought on there for further Directions, or on the Equity reserved, as in the Case of an Issue; and if an Action at Law, under an implied Direction of the Court of Chancery be defeated by a formal Objection taken at the Trial, the Court of Chancery will make the Party taking the Objection pay the Costs (*b*); and in the Course of an Action brought under the Direction of the Court, if the Mode is misconceived, the Party should apply by Petition, to enable the Court to do complete Justice (*c*). If either Party is dissatisfied with the Verdict, he may move for a *new Trial*; but in an Action and an Issue directed by the Court, the Practice varies. Lord Eldon laid it down as a General Rule of Practice, that in *an Action at Law*, directed by the Court, the Application for a new Trial, must be to the Court in which it was tried, till they are satisfied with the Verdict, and that the Rule was not affected by any special Provisions, by which the Direction of the Action is accompanied; but that *in an Issue*, the Motion for a new Trial must be made to the Court of Chancery (*d*): in the latter Case it would

(*a*) 4 Bro. P. C. 700.(*c*) 1 Cox, 143.(*b*) Peake, 69. 4 Ves. 71.(*d*) Coop. 96. 2 Rose, 178.

4 Madd. 214. 2 Hullock, 626. 4 Mau. and Sel. 192.

be proper to obtain through the Application of the Court, Copy of the Judge's Report who tried the Issue ; but it is not considered as a Motion of course, to obtain a Judge's Report of a Trial at Law, previous to a Motion for a new Trial of an Issue directed out of the Court of Chancery: it having been determined on a Conference between the *Lord Chancellor*, the *Master of the Rolls*, and the *Vice Chancellor*, that they would not call upon the Judge who tried the Cause at Law, to make his Report until they were satisfied that there were reasonable Grounds for entertaining the Motion for a new Trial (*a*) ; and the Vice Chancellor has acted upon the Statement of Counsel who attended the Trial at Law, without requiring an Affidavit of the Facts represented to have passed on the Trial (*b*) : the Judge's Notes are not received as Evidence of those Facts, they must be brought before the Court by Affidavit (*c*). It should not escape the Attention of the junior Practiser, that although the Issue or the Action was directed by the Master of the Rolls or the Vice Chancellor, a Motion for a new Trial may be made to the Lord Chancellor ; and it has been sometimes made indirectly to avoid an Appeal : but Lord Eldon has observed, that Convenience requires, that if the Judge who directed the Issue should remain, and there had been any particular Discussion, the Application should be made to him (*d*). The Solicitor for the Party applying for a new Trial, must give Notice in Writing, (*see Notices*) and be prepared with an Affidavit of Service upon the adverse Clerk in Court, and he should also give the former Brief to Counsel, with a Copy of the Judge's Report, or an Affidavit of the Facts proved upon the Trial, and such other material Facts as he may have collected, in support of the Motion ; he should also attend the Court when the Motion comes on, and be prepared with every requisite Document ;

(*a*) 6 Madd. 58.

(*b*) Ibid.

(*c*) 6 Madd. 113.

(*d*) 11 Ves. 50. 2 V. and
Bea. 56.

if an Order is made, it must be drawn up, passed and entered, and the Issue taken down again for Trial; and if a Witness examined on the former Trial and in the Cause, dies in the Interval, his Deposition may be read, and what he swore at the former, given in Evidence (*a*).

New Trials are directed in Matters of Value and Importance, according to the Circumstances of the Case (*b*): where the Judge certifies that the Weight of Evidence was against the Verdict (*c*); or upon a Mis-direction of the Judge (*d*); and so upon Discovery of new and material Evidence after the Trial, although the Judge has certified that he is satisfied with the Verdict, a new Trial will be granted (*e*); and where there has been a Trial at Bar, a new Trial has been granted, the Court entertaining no doubt upon the Right to grant a new Trial, though Courts of Law, on a Verdict not against Evidence, have had great difficulty (*f*); but it will not direct a new Trial if the Evidence has been kept back *ex proposito*, there being no Fraud or surprize, though the Court is much dissatisfied with the Verdict (*g*); and wherever the Court is satisfied that considering the Judge's Report, and the Record of the Suit in Equity, Justice has been done upon the Whole, though some Evidence has been improperly rejected at Law, a new Trial will be refused (*h*). The Intent of directing Issues being only to inform the Conscience of the Court, it is not tied down to the same Strictness of Verdicts, as Courts of Law, nor will a new Trial be granted upon a Suggestion that the Party was not apprized of a particular Point of Evidence being adduced, and therefore not prepared to combat it; for on finding such Evidence brought forward, he might have been non-suited, and have come back to the

(*a*) 2 P. Wms. 563.

(*b*) 1 Ves. 29. Ambl. 324.

(*c*) Ambl. 210.

(*d*) Ambl. 323.

(*e*) 2 Ves. 553.

(*f*) 1 Ves. 28. 9 Ves. 165.

1 P. Wms. 207. 2 Atk. 320.

(*g*) 1 Ves. 133.

(*h*) 11 Ves. 53. 2 Atk. 320.

3 Ves. and Be. 41.

do not in all Cases follow the Verdict, but that generally speaking, they do follow the Event, and are given to the Party who prevails at Law (a): and that the Costs of an unsuccessful Application for a new Trial, do not of consequence fall within the Costs of Suit, or rather cannot be Costs in the Cause (b).

If a Point at Law arises at the Hearing of the Cause, an interlocutory Order is frequently pronounced, directing the special Matter in the Shape of a Case to be made up and sent to a Court of Law for the Opinion of the Judges; and in very special and intricate Questions, the Lord Chancellor calls to his Assistance, two or more of the Judges of the Courts of Law, who attend him in the Court of Chancery, and upon such occasions, give their opinions *seriatim* (c); formerly in Cases of small Value, a Case was directed to be argued before two Judges at their Chambers (d); but this Practice seems to have ceased with Lord Hardwicke, and recently the Courts of Law have certified their Opinions upon Cases directed by the Master of the Rolls or the Vice-Chancellor (e).

The Order directs a Case to be made for the Opinion of that Court of Law, whose Opinion is to be taken; and the special Matter upon which the Question arises to be inserted in the Case, and the Question in *hac verba* to be submitted to the Consideration of the Judges, referring to one of the Masters of the Court to settle the Case if the Parties differ (f): sometimes the Facts are embodied in the Order without reference to the Master to settle (g); it should not escape the Attention of the Junior Practiser, that the Court of Law has no jurisdiction to solve any Question, not expressly stated in the Case (h); nor will they Answer

(a) Beam. Costs. 284.

(e) 6 T. R. 313.

(b) 2 P. Wms. 68. Dick.
796. 13 Ves. 87.

(f) Dick. 474. 1 Swanst.
320.

(c) 3 Atk. 735. 1 Swan. 314.

(g) Dick. 73.

(d) 15 Ves. 92. 1 Ja. and
Wa. 314.

(h) 3 Taunt. 245.

speculative Questions, the Case, therefore, must state some Fact that will raise the Question (a): the Court of King's Bench refused to certify their Opinion upon a Case stated as a Trust (b); but the Court of Chancery is not bound by the Certificate of a Court of Law (c); where the Lord Chancellor was not satisfied with a Certificate of the Court of Common Pleas in the Negative, he sent a Case to the Court of King's Bench, there being only one Instance of sending a Case back to the same Court to be reviewed (d); and recently the Lord Chancellor being dissatisfied with the Opinion of the Court of Common Pleas, called to his Assistance the Lord Chief Baron, and one of the Judges of the King's Bench (e).

To carry this Order into Effect, Instructions must be given to one of the Counsel in the Cause, to prepare and settle a Case as directed by the Court; for this Purpose the Brief on the Hearing, and a Copy of the Order will be sufficient; when the Case has been prepared and settled, a fair Copy of the Draft should be delivered over to the Solicitor on the other Side, and if the Parties differ so as to call for the interference of the Master, a Copy of the Order, and of the Draft of the Case must be left at the Master's Chambers, and the usual Warrants on leaving and to proceed taken out and served, as before mentioned, in settling an Issue; but the Master has no Authority to vary or alter any Directions given by the Order: for this Purpose an Application must be made to the Master of the Rolls or to the Vice-Chancellor who made the Order; but as neither of them are authorized to discharge, vary, or alter the Order of the other, an appealed Motion may be made to the Lord Chancellor: when the Master has settled the Form of the Case, it must be signed by Counsel on each Side, and Instructions must be given to

(a) 1 Ja. and Wa. 426.

(d) 10 Ves. 494. 3 T. R.

(b) 4 Ves. 790. 5 Ves. 581. 539. 4 T. R. 570.

(c) 1 Swanst. 320.

(e) 1 Swanst. 314.

move for a *Concilium* in the Court of Law, and the Case set down for Argument with the Clerks of the Papers, if in the King's Bench; but it may be proper to observe, that unless the Case is previously signed by Counsel on both Sides, the Clerk of the Papers will not receive it. Lord Eldon has decided that a Case sent for the Opinion of a Court of Law, must be signed by Counsel on each Side (*a*); and that if either Side refused to sign, they would be understood to waive the Benefit of it: and so, in the Court of Common Pleas, the Signature of a Serjeant is required before it can be set down (*b*). Briefs must be prepared and delivered to Counsel, and fair Copies of the Case must be made for each of the Judges, and left as usual with their respective Clerks, at Chambers, a convenient Time before the Agreement. The Case will be called on in its Turn, and the Solicitor should attend with the Papers and Proceedings, and be prepared to give such Information as the Judges may require. After the Case has been argued, the Judges certify their Opinion jointly, or *seriatim* if they differ; usually without expressing the Ground upon which their Opinion is founded. Sometimes, though rarely, openly in Court: in *Wright v. Holford*, their Opinion was so expressed for the first Time (*c*). Where a Case was sent for the Opinion of the Court of King's Bench, Lord Ellenborough stated, that the Court would, if it were wished, turn the Case into a special Verdict, so that it might come before the Twelve Judges, observing, that he could not anticipate to what Decision that Court might come to, with their Assistance (*d*).

The Judge's Certificate must be filed in the Report-Office in Chancery, and an Office-Copy taken, and the Cause brought on for Hearing on the Equity reserved by Petition, (*see Petitions*) ingrossed on the proper Stamps, and left with the respective Secretaries either of the Lord Chan-

(*a*) 1 Ja. and Wa. 426.

(*b*) 7 Taunt. 85.

(*c*) 17 Ves. 72. Coop. 31.

(*d*) Maule and Sel. 512.

1 Madd. Rep. 534. n.

cellor, or of the Master of the Rolls, before whom the Cause is intended to be heard, in Court or at the Rolls. A Copy of the Petition must be left at the same Time: the Petition when answered must be taken to the Register-Office, and the Order for setting down the Cause drawn up, passed and entered, and the Cause set down in the Register-Book, and the Order must be served as usual, upon the adverse Clerk in Court. A Copy of the Judge's Certificate, and the decretal Order should be left at the same Time with the Lord Chancellor's Gentleman of the Chamber, if set down in Court, or with the Secretary at the Rolls if to be heard there, a few Days before the Petition comes on to be heard, with a Fee of Five Shillings, and the Cause will come on in its Turn. The former Briefs, with the Certificate of the Judges, and such additional Information as may be necessary for hearing the Equity reserved, on further Direction, must be delivered to Counsel, and the Hearing attended by the Solicitor, for which Instructions have been given in a former Part of this Work.

Where after an Issue, or an Action directed by the Court, the Lord Chancellor administers equitable Relief, his own Judgment ought to concur with the Verdict, or at least, he ought not to be dissatisfied with the Verdict; if he is, a new Trial should be directed (*a*). It remains to subjoin, that there is no Instance of an Issue directed to try a Trust (*b*).

Where an Issue was directed to try the Validity of a Will, a Party interested in the Trial, objecting to being a Party to the Issue, and to being interested in the Order for the Production of Books, Papers, and Writings, was at liberty to attend the Trial, but ordered to produce the Documents with Exception as to those he possessed as Mortgagee (*c*).

(*a*) 8 Ves. 536.

(*b*) 2 Atk. 263.

(*c*) 6 Madd. 48.

BILL OF COSTS

ON

A PETITION

For appointing Guardian to an Infant.

IN CHANCERY.

In the Matter of JOHNSON, an Infant.

HILARY TERM, 1823.

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Attending taking Instruction for Petition - -	0	6	8			
Making Copy of the Will of Mr. John Edwards, three Brief Sheets for Use - -	0	7	6	0	7	6
The like of Mr. Edwards, two Brief Sheets - -	0	5	0	0	5	0
Drawing Petition, fol. 15	0	15	0			
Engrossing, and Duty -	0	7	6			
Paid answering Petition -	0	5	6			
Attending to present the Petition, and afterwards for same	0	6	8			
Paid for the Order -	0	12	6			
Paid entering -	0	3	0			
Copy of the Order for the Master	0	2	6			
Drawing State of Facts, and fair Copy, fol. 19 -	0	12	8			
Attending, taking Instructions for Affidavit, in support thereof (a)	0	13	4	0	6	8
Drawing same, fol. 9 -	0	9	0			

(a) This being a special Affidavit, the Instructions are allowed.

BILL OF COSTS FOR DEFENDANTS. 669

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Attending, reading over, and settling same - -	0	6	8			
Engrossing, Duty, and Oath	0	7	2			
Warrant on leaving State of Facts and Affidavit, Copy, and Service	0	4	6			
Warrant to proceed, Copy, and Service	0	4	6			
Attending thereon, when the Master required in addition to the Affidavit, that Jane Giles should sign her Consent to your being appointed the Guardian -	0	6	8			
Drawing a fair Copy of Consent, for her to sign - -	0	2	6			
Attending her signing same	0	13	4	0	6	8
Another Warrant to proceed on State of Facts, Copy, and Service	0	4	6			
Attending thereon, when the State of Facts was allowed -	0	6	8			
Paid for a Copy Draft of the Master's Report, fol. 24 -	0	12	0			
Making Copy thereof (a) -	0	4	0	0	4	0
Perusing and considering the same, and making several Alterations	0	6	8	0	6	8
Warrant on preparing Report, Copy and Service -	0	4	6			
Warrant to settle, Copy, and Service	0	4	6			
Attending thereon -	0	6	8			
Warrant to sign Report, Copy, and Service - -	0	4	6			
Attending examining the Transcript of the Report - -	0	6	8			
Paid for Report, and transcribing	1	16	0			
Gave Master's Clerk -	2	2	0			
Attending for Report, and filing	0	6	8			

(a) See preceding Bills, and the Observations thereon.

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Paid filing, and for Office Copy	0	11	4			
Instructions for Petition -	0	6	8			
Drawing and fair Copy Petition to confirm Report, and for Appointment of Guardian, fol. 27	1	7	0			
Engrossing the same to present, and Duty - -	0	11	8			
Paid answering the same -	0	5	6			
Copy of Petition for Counsel, 3 Brief Sheets - -	1	10	0			
Fee to Mr. Maddock and Clerk	2	4	6			
Attending him - -	0	6	8			
Attending Court, Petition heard, and Order made confirming Report, and appointing you the Guardian, on entering into a Recognizance to account - -	0	13	4			
Paid Court Fees -	0	7	0			
Paid for Minutes - -	0	4	0			
Attending settling -	0	6	8			
Paid for Order - -	1	12	0			
Perusing, and attending Register examining and passing -	0	6	8			
Paid entering same - -	0	6	0			
Letters and Messengers - -	0	5	0			

EASTER TERM, 1824.

Copy of the Order for the Master	0	2	6			
Paid Master's Clerk drawing and engrossing Recognizance -	0	10	0			
Paid for Copy Draft of ditto -	0	6	0			
Paid for Allowance - -	0	2	6			
Paid for Duty and Parchment	2	0	0			
Attending to get Recognizance entered into - -	0	6	8			

FOR DEFENDANTS.

671

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Paid for one Cognizor -	0	2	6			
Paid Master's Clerk's Attendance to inroll Recognizance, and for Re- ceipts - - -	0	9	2			
Paid inrolling Recognizance -	0	7	6			
Paid for Copy Draft Report	0	4	0			
Warrant on preparing Copy, and Service - - -	0	4	6			
The like to settle - - -	0	4	6			
Attending thereon -	0	6	8			
Paid for Report (a) transcribing and Stamp - - -	1	10	0			
Gave Master's Clerk - - -	2	2	0			
Attending the Master for Report, and to file same - - -	0	6	8			
Paid filing and Office Copy -	0	5	10			
Letters and Messengers -	0	5	0			

(a) If the Application had been made in a Cause, as frequently is the Case before Hearing, the Report would have been only 15s.

PRACTICAL DIRECTIONS

AND

REMARKS,

On a Petition for appointing a Guardian of the Person and Estate and Maintenance of an Infant.

FORM OF THE PETITION.

On the Behalf of ROBERT JOHNSON, an INFANT.

“ To the right honourable the Master of the Rolls.

“ *The humble Petition of Robert Johnson, an Infant of the Age of 17 Years, or thereabouts ;*

Sheweth,

“ THAT your Petitioner's late Uncle, John Giles of Colchester, in the County of Essex Gentleman, by his last Will and Testament duly executed, bearing Date the 10th Day of May, 1809, among other Things gave and devised (*here state the Devise in which the Infant is interested, either in Possession or Reversion.*)

“ That your Petitioner's late Father Stephen Johnson, by his last Will and Testament, dated the 15th Day of June, 1799, gave and bequeathed unto your Petitioner, 10,000l. 3 per Cent. consolidated Annuities, and of his said Will appointed his Brother-in-law George Giles, your Petitioner's Uncle his Executor, who hath duly proved the same in the proper Ecclesiastical Court.

“ That your Petitioner's Mother died in the Life-time of the said Stephen Johnson ; and the said Stephen Johnson died on or about the 25th Day of June last, leaving your Petitioner, his eldest Son and Heir at Law, and two Daughters.

“ That your Petitioner has requested the said George Giles to be Guardian of your Petitioner’s Person and Fortune, which he has agreed to accept.

“ Your Petitioner, therefore, humbly prays your Honour, that the said George Giles may be appointed the Guardian of your Petitioner’s Person and Fortune, during your Petitioner’s Minority.

“ And your Petitioner shall ever pray, &c.”

The marginal Order made by the Master of the Rolls upon the Petition left with his Secretary, is to the following Effect :

“ It is ordered that it be referred to Mr. Stephen, one of the Masters of this Court, to approve of a proper Person or Persons to be appointed Guardian or Guardians of the Petitioner during his Minority ; and all proper Parties are to have Notice to attend the said Master thereon, and be at Liberty to propose such Guardian or Guardians ; and the said Master is to certify the Petitioner’s Age, and the Nature and Amount of his Fortune, and what Relations he has, and on what Evidence or Ground he approves of any particular Person or Persons to be such Guardian or Guardians : and after the said Master shall have made his Report, such further Order shall be made as shall be just.”

The Petition answered, must be left at the Register-Office, with Mr. Bird, who will draw up and pass the Order, which must be entered with the proper Entering Clerk.

When the Order is passed and entered, a Copy must be left with the Master, to whom the Matter is referred ; a State of Facts and Proposal must be prepared, which should state the Property of the Infant, in what Manner he became entitled, the yearly Value of any Freehold, Copyhold, or Leasehold Estates of which such Property consists, and the Amount of the Personalty : the Infant’s Age, and the Names of his Relations, or next of Kin, and of the Person proposed to be appointed Guardian.

After stating the Infant's real Estates, and in what Manner he became entitled thereto, the State of Facts may proceed as follows :

“ That the said Freehold and Copyhold Estates, to which the said Infant is entitled in Tail Male, in Possession, are of the yearly Value of 250*l.* or thereabouts ; and the said Freehold and Copyhold Estates, to which he is entitled in Fee in Possession, are of the yearly Value of 60*l.* or thereabouts : and the Estates to which he is entitled in Fee, upon the Death of the said *A. B.* without issue, are of the yearly Value of 210*l.* or thereabouts ; and that the said Infant is not entitled to any other real Estate.

“ That the said Infant is entitled to the Sum of 1,000*l.* 3 per Cent. Consolidated Bank Annuities, bequeathed to him in and by the Will of his late Father, Stephen Johnson, bearing Date the 15th Day of June, 1799, which said Sum of 1,000*l.* Consolidated 3 per Cent. Annuities still stands in the Name of the said Stephen Johnson, deceased, in the Books of the Bank of England, subjected to his Will ; and that the said Infant is not entitled to any other personal Estate.

“ That the said George Giles, and Jane Giles, of Colchester, aforesaid, Spinster, are the Uncle and Aunt of the said Infant by the Mother's Side ; and he has no other Relations, except two Sisters, who are Infants.

“ That the said Infant is now of the Age of 17 Years, or thereabouts.

“ The said Infant, and the said George Giles, and Jane Giles, his Uncle and Aunt, propose the said George Giles to be the Guardian of the Person and Estate of the said Infant during his Minority.”

The Affidavit in Support of the above State of Facts may be to the following Effect.

“ In the Matter of Robert Johnson, an Infant.

“ George Giles, of Onger, in the County of Essex, Gent. maketh Oath and saith, ‘ That the Estate to which the said Robert Johnson is entitled to Tail Male, under the Will of

John Giles, deceased, consists of a Freehold and Copyhold Estate, at Oldham, in the County of Essex, and is of the yearly Value of 250l. or thereabouts: and that the Estate to which he is entitled in Fee in Possession, under the said Will, consists of a Freehold and Copyhold Estate at Rumford, in the County aforesaid, and is of the yearly Value of 60l. or thereabouts, *so describing the other Estates;*) and this Deponent further saith, that the said Robert Johnson, the Infant, is entitled to the sum of 1000l. Consolidated 8 per Cent. Bank Annuities, being a Legacy or Bequest in the Will of his late Father Stephen Johnson, and which said Sum of 1000l. is now standing in the Name of the said Stephen Johnson, in the Books of the Bank, subject to the said Will; and this Deponent further saith, that the said Robert Johnson is not entitled to any other Property, real or personal, to the Knowledge or Belief of this Deponent; and this Deponent further saith, that the said Robert Johnson was born some Time in the Month of January, 1808, as this Deponent believes, and that this Deponent and Jane Giles, this Deponent's Sister, are the only Relations of the said Robert Johnson by his Mother's Side, as this Deponent knows or believes; and that the said Robert Johnson hath no Relations on his Father's Side, to the Knowledge or Belief of this Deponent; and this Deponent further saith, that the said Jane Giles, this Deponent's Sister, declines being a Guardian of the said Robert Johnson.

The State of Facts and Proposal must be fair copied and left with the Affidavit in support of it at the Master's Office, and a Warrant taken out on leaving them, and successive Warrants taken out to proceed, and attended; when the Master has approved of the Person proposed as Guardian, he will prepare a Draft of his Report, and the usual Warrants on preparing the Draft, and to settle and sign the Report must be taken out, and the Master attended thereon, when the Master has signed his Report, it must be filed, and Office Copy taken from the Report Office; a

Report of Maintenance cannot be confirmed on a Motion (a); a Petition for that Purpose must be presented to the Master of the Rolls, or to the Chancellor; the Petition may be in the Name of the Infant only, or by the Infant and the Person named as his Guardian, stating the Order of Reference and the Master's Report and other incidental Matters. The Prayer of the Petition may be "That the Report of the said Master may be confirmed, and that *your Petitioner*, the said George Giles, may be appointed the Guardian of your Petitioner the Infant's Person and Fortune, and that the Costs of your Petitioner respecting this Application may be taxed and paid out of the said Infant's Property, or the Income thereof, and proper Directions given for that Purpose; or that your Honour will be pleased to make such other Order in the Premises as to your Honour shall seem meet.

"And your Petitioner will ever pray, &c."

The Petition, with a Copy thereof, and a Copy of the Report, must be left with the Secretary at the Rolls (if presented there, or with the Lord Chancellor's Secretary if intended to be heard in Court) who will get the Petition answered, and will set it down in the Paper of Petitions to be heard in its Course.

On the Hearing of the Petition, an Order will be made, confirming the Report, and appointing the Person proposed Guardian, on his entering into a Recognizance duly to account for the Infant's Property and Fortune.

The Order must be drawn up, passed, and entered, at the Register Office, and a Copy left with the Master, whose Clerk will prepare the Recognizance, and see that the same is duly entered into.

This Recognizance should be vacated when the Infant arrives of Age, and the Guardian has settled his Accounts with him. An Order for that Purpose will be made, on Application to the Court by a Petition.

If the Application be for *Maintenance*, as well as for a *Guardian*, a Proposal for an Allowance must be brought in before the Master, and a Sum proportioned to the annual Income of the Infant's Fortune must be proposed, as well for the Time past (the Order usually extends to such an Allowance,) as for the Time to come, *See Proposal*. This Proposal must be grounded on a very full Statement, setting forth the Infant's Property, and the Sums of Money which have been expended for the Infant's Maintenance, Clothes, and Education, from the Time mentioned in the Order, and by whom paid, supported by an Affidavit, verifying the material Facts; and if there is a Cause in Court, a Warrant must be taken out, and served upon the adverse Clerk in Court, underwritten "that the Plaintiff has left a Proposal for Guardian and Maintenance, and an Affidavit in Support thereof," as directed in the former Part of this Work. The Proposal after setting out very minutely in the Shape of a State of Facts all the Property of the Infant, and the Expenditure in detail, may conclude by stating;

"The Plaintiff (*or the Petitioner*) therefore proposes, that the Sum of 80*l.* may be allowed for the Cloathing, Maintenance, and Education of the said James Edwards for the Time past, and to come, to commence from the said 5th Day of June, 1809, (*the Day of the Death of the Infant's Father,*) and to be paid to the said Defendant, James Goodall, or to such other Person or Persons, who shall maintain, cloathe, and educate him in future."

This Proposal must be varied and accommodated to Circumstances, and proceeded upon as before directed for the Appointment of a Guardian; and, after the Master has made his Report, an Application must be made by Petition to the Master of the Rolls, or the Court, in the Name of the Party prosecuting the Inquiry; the Petition, after stating the Master's Report, the Orders for Payment of Money into Court, the Stock purchased, (if the Money

has been laid out,) and the Dividend accrued, or of what the Infant's Property consists, may pray,

“ That the said Master's said Report may be confirmed, and that the said Defendant, James Goodall (*or Plaintiff, if in a Cause in Court, or as the Case is*) may be appointed Guardian of the Person and Estate of *your Petitioner* James Edwards: and that the annual Sum of 150l. may be allowed to the said James Goodall, for the Maintenance and Education of *your Petitioner* for the Time past, to be computed from the said 5th Day of June, 1809, to the 5th Day of June last, which will amount to the Sum of 200l.; and that the Sum of 187l. 10s. 8d. Dividends accruing from the said Sum of 1,564l. 7s. Bank 3 per Cent. Consolidated Annuities, may be applied towards Payment thereof; and that the Accountant-General may be directed to pay the same to the said James Goodall out of the Sum of 720l. 8s. 10d. Cash in the Bank; and that the Residue of such Cash in the Bank, being the Sum of 520l. 8s. 10d. may be laid out in the Purchase of Bank 3 per Cent. Annuities, in Trust for *your Petitioner*, and that the said Sum of 1,564l. 7s. Bank 3 per Cent. Annuities, purchased as aforesaid, with the said 1,000l. Legacy, pursuant to the said Order of the 18th Day of April, 1809, may be placed to the Credit of *your Petitioner*, and that the half-yearly Interest of the said 1,564l. 7s. being the Sum of 23l. 8s. 10d. may be paid from henceforth to the said James Goodall, for the Maintenance and Education of *your Petitioner*, until the further Order of this Court, and for that Purpose that the Accountant-General may draw on the Bank, according to the Rules and Orders of this Court, and that the Costs consequent upon this Application may be directed to be taxed by the said Master, and paid to *your Petitioner* out of the Infant's Property, or the Income thereof; and that the Accountant-General may be directed to sell out so much of the said 1,564l. 7s. 6d. Bank 3 per Cent. Consolidated Annuities, as may be sufficient to pay what the said

Master shall certify to be due for the Petitioner's Costs as aforesaid, and that he may be directed to pay the same to your Petitioner, or that your Honour will be pleased to make such other Order in the Premises as to your Honour shall seem meet."

"And your Petitioner," &c.

The like Proceedings take place upon this Petition, as before directed, for the Appointment of a Guardian, and the Accountant-General's Certificate of the Fund standing in his Name, (if any) must be produced on the Hearing, and an Affidavit of Service of the Petition; the Minutes of the Order will be drawn up by the Register attending the Court when the Order was made; the Money to be paid for the Maintenance, (if to be paid out of a Fund in Court,) the Solicitor for the other Parties should carefully attend too, that no Irregularity or Confusion may arise in the respective Money Accounts; a Note in Writing of the Appointment by the Register for settling the Minutes must be given to the Solicitors interested in the Payment of the Money, and the Register attended, and the Minutes settled, the Register will draw up the Order; and a similar Note, appointing a Time to pass the Order, must be likewise given to the Solicitor for the other Side; but unless they bespeak and pay for the Office Copies, their Attendance is treated as a Nullity (a).

The Register will then pass the Order, which must afterwards be entered with the Clerk at the entering Books, in the Register Office; the Order thus passed and entered must be taken to the Accountant-General's Office, and the Money directed will be paid to the Party, pursuant to the Order, and for which Instructions have been before given (b); his Solicitor, or Clerk in Court, must certify that he is the Person named in the Order, to whom the Payment is to be made; or if the Party cannot personally

(a) Ant. p. 584.

(b) Ant. p. 441.

attend, the Money may be paid under a Power of Attorney, which of late Years has been usually prepared by the Clerks at the Accountant-General's Office, for which the Commissioners in their Report of Fees (*a*). state the Allowance of a Fee of 3s. 6d. exclusive of Stamps, *when prepared by them*; but from the Ambiguity of the Expression, it should seem *that when prepared by the Solicitor*, the Power of Attorney would be a valid and regular Authority, and if any difficulty should arise in obtaining Payment, an Application should be made to the Court for an Order upon the Accountant-General to pay the Money to the Person named in the Power of Attorney, or more conveniently to some Banker, or Person residing in Town, whose personal Attendance would obviate any Objection.

Where the Infant's Property is small, though there is no Cause depending, a Guardian with an Allowance for Maintenance, is sometimes appointed upon a summary Application without reference to a Master (*b*); for this Purpose, an Application must be made by Motion, or by Petition to the Master of the Rolls, supported by a very full Affidavit of the Property, the Age, and Situation of the Infant, and the Circumstances and Condition in Life of the Person to be appointed Guardian: the Petition properly engrossed with the Affidavit, must be left with his Honour's Secretary at the Rolls, and if the Prayer of the Petition is granted, it is always upon filing the Affidavit, the Petition with his Honour's Order thereon, must be left with Mr. Bird at the Register Office, who upon producing to him an Office Copy of the Affidavit, will draw up and pass the Order, which must be entered as usual there; if the Petition prays for the Appointment of a Receiver, there must be a Reference to a Master (*c*); a Guardian to an Orphan Infant, without Property, has been appointed by Petition of her

(*a*) Report, pa. 29.

(*c*) 1 Atk. 489. 2 Atk. 315.

(*b*) 10 Ves. 159. 15 Ves. 15 Ves. 445.

445. 16 Ves. 266. 2 Atk. 14.

Brother and nearest Relation, under the 26 Geo. 2, c. 33. to Consent to her Marriage, supported by Affidavit of the Petitioner's Brother, that the Father died a Widower, and that the Infant had no Property real or personal, and was of the Age of 20 (*a*); but where the Infant's Property amounted to 1,500*l.* it was refused (*b*); and so where it amounted to 150*l.* per Annum (*c*).

A Guardian cannot take any Thing from his Ward, for his Benefit except his Demand, pending his Guardianship, nor at its Close; nor until the Relation, and Influence have ceased (*d*). If the Guardian expends more in the Maintenance of an Infant, than the Sum settled by the Court, unless under very special Circumstances, the Court will not make any Reference as to such extra Expenditure (*e*); if the Guardian does not do his Duty, or if any sufficient Ground be made out, the Court will remove him, but so long as he continues he is responsible (*f*).

(*a*) 1 Bro. C. C. 556. 1
Madd. Rep. 213.

(*b*) 16 Ves. 266.

(*c*) 1 Ja. and Wa. 395.

(*d*) 18 Ves. 127, 213.

(*e*) 1 Cox. 417.

(*f*) 1 Ja. and Wa. 482.

PRACTICAL OBSERVATIONS

AND

REMARKS.

THE Lord Chancellor, by Right derived from the Crown, is the general and supreme Guardian of all Infants; his Jurisdiction is exclusive, but he exercises no Control on either, unless they are Wards of the Court of Chancery by a Suit instituted on their Behalf (*a*); but the Father has the actual and exclusive Right to the Custody of his Child (*b*). Constant Habits of *Drunkenness and Blasphemy*, and in some Cases very gross ill-Treatment, have been held sufficient for the Court to take a Child from the Control of a Father (*c*); in one Instance, Insolvency was held sufficient to remove a Child from his Control (*d*). A Father has been prevented from taking his Child *abroad*, with an Intention to Educate him there (*e*); upon such a Suspicion the Court has interfered (*f*), and obliged the Father to give Security not to remove the Child out of the Jurisdiction of the Court, not even to go to North Britain (*g*). The Court never makes an Order for a Guardian to take an Infant out of its Jurisdiction (*h*), and if taken out, the Guardian will be ordered to bring it back (*i*).

By *Stat. 12 Car. 2. c. 25.* any Father *under Age, or of full Age*, may by Deed or Will dispose of the Custody of his Child, either *born or unborn*, to any Person, except a

(*a*) Ambl. 303. For. 60.

(*b*) 3 P. Wms. 154.

(*c*) 10 Ves. 61. 12 Ves. 492.

(*d*) Dick. 631.

(*e*) 10 Ves. 55, 63. 4 Pro.

C. C. 101. 1 P. Wms. 704. n.

(*f*) 2 P. Wms. 102.

(*g*) 10 Ves. 52.

(*h*) 6 Ves. 363.

(*i*) 2 Chan. Ca. 237.

Popish Recusant, either in Possession or Reversion, till such Child attains twenty-one Years, and the Guardians so appointed are called Statute Guardians. A testamentary Appointment of a Guardian is not revoked by a subsequent testamentary Appointment not executed according to the Statute, not tacitly imposing a Revocation (*a*) *by Statute*, or *testamentary* Guardians. This Statute enables the Father *but not the Mother* (*b*) to dispose of the Guardianship of Children born and to be born, including Children by a second Wife, until 21 (*c*), but not beyond that period (*d*); and though the Marriage of *the Male Infant* does not determine the Guardianship until he arrives at 21 (*e*), by the Marriage of a *Female Infant*, within age, the Guardianship is determined (*f*). The Statute does not enable a Father to appoint a Guardian to a *Natural Child*, but the appointment of a Father by Will of Guardians has been confirmed upon Petition, praying the Appointment of such Persons, and they appearing and consenting, Sir. William Grant thought it necessary to refer it to the Master to approve of them (*g*); but recently the Course has been to direct a Reference to the Master, to see if the Guardian is a fit and proper Person (*h*); and where a *feme-covert* was appointed Guardian of an *illegitimate* Child, Payment of the Allowance to her has been ordered on her separate Receipts (*i*). A Grandfather has no Power to appoint Guardians of his Grandson, the Right being vested in the Father; a Guardian appointed for a Child by a Stranger during the Life of the Parent, is void; but if a considerable Legacy be given, the Court will take care that a Child is educated according

(*a*) 7 Ves. 347.

(*b*) 3 Atk. 519.

(*c*) 7 Ves. 348.

(*d*) 2 P. Wms. 638.

(*e*) 3 Atk. 626. 1 Ves. 91.

160.

(*f*) Ibid.

(*g*) 3 Bro. C.C. 683. 2 Cox. 46. 1 Ja. and Wa. 106.

(*h*) *Elves v. Const*, 10 Feb.

1818. MSS.

(*i*) 13 Ves. 517.

to his Expectations *(a)*. A Stranger can give his Estate on what Conditions he pleases; and where a Grandfather has given his Estate to a Grandson, and appointed Guardians of his Estate and Person, if the Father did not submit to the Will, his Opposition has worked a Forfeiture of his Son's Estate: but if there is any Gift in the Will to the Father, and he accepts it, the Court will direct and appoint a Guardian on his presumed Submission *(b)*; but if the Father, not knowing that he was making an Election, pays back the Money, the Court will not interfere *(c)*. A *testamentary Guardian*, by Statute, has all Remedies at Law which a Father has *(d)*, and his Power is considered as a Continuation of his parental Authority *(e)*. Guardians at common Law may be removed, or compelled to give Security, if there is any Danger of their abusing the Person or Estate of their Ward *(f)*; but a Statute Guardian is not wholly removed, though Terms have been imposed on them to prevent their doing any Injury to the Prejudice of the Infant *(g)*: but a Guardian is considered only a Trustee, on whose Misbehaviour, or giving Occasion for Suspicion, the Court will interfere *(h)*. A testamentary Guardianship is not assignable, and it being a bare Power or Trust, and but an Authority coupled with an Interest, if one or more of several Guardians die, the Guardianship survives, and will not pass to their Representatives *(i)*. If a *testamentary Guardian* refuses to act, a summary Application by Petition may be resorted to, for the Appointment of another Guardian *(k)*; but it should seem that if a Guardian has accepted the

(a) 2 Bro. C. C. 500. 4 Bro. C. C. 101.

(b) Ambl. 306. 7. 6 Madd. 89.

(c) 10 Ves. 63.

(d) Ambl. 302.

(e) 2 P. Wms. 115.

(f) 3 Ch. Rep. 58. 2 Ch. Co. 237.

(g) 1 P. Wms. 698. 2 P. Wms. 112.

(h) 1 P. Wms. 702.

(i) 2 P. Wms. 103. 121.

Vaughs. Rep. 179.

(k) 1 Sch. and Lef. 106.

3 Bro. C. C. 500.

Guardianship, if he refuses to act, the Court will compel him to act, and not appoint another in his Stead, but under very particular Circumstances (*a*). If the Guardian misbehaves, the Court, as a Matter of Fact, has Jurisdiction, and will interpose by Petition (*b*); and where he does not do his Duty, or if any other sufficient Ground be made out, the Court will allow him to be removed; but so long as he remains, he is considered responsible (*c*); but any Act of the Guardian, though without Authority, if it be beneficial to the Infant, will be protected (*d*); and if it be necessary to *change* the Guardian it may be done upon Petition (*e*); but if the Guardian has acted, to remove him for Misconduct a Bill must be filed (*f*). Bankruptcy would be a good Cause for changing a Guardian, and for a Reference to a Master to approve of another Person to act as Guardian (*g*); but a Guardian is not objectionable because he dissents from the Doctrine of the Established Church (*h*). Lord Manners held that the Marriage of a second Husband *per se* was not a sufficient Reason for taking away a testamentary Guardianship from a Mother, though Devisee expectant upon the Death of the Infant without Issue (*i*); a testamentary Guardian cannot change the Nature of the Estate by turning real Estate into personal, or Personalty into Real (*k*), unless authorized by the Will (*l*). Where Guardians disagree as to the Management of the Ward, the Guardianship devolves on the Court (*m*), and parol Evidence will be admitted to shew the Intention of the Father, as to the Education of the Infant (*n*).

(*a*) Ambl. 28.

(*b*) 2 P. Wms. 106.

(*c*) 1 Ja. and Wa. 482.

(*d*) 18 Ves. 273.

(*e*) 7 Ves. 348.

(*f*) 1 Seb. and Lef. 106.

(*g*) Dick. 631.

(*h*) 1 Bull and Best. 61.

(*i*) 3 Bro. C. C. 341. 349.

1 Ball and Bea. 61.

(*k*) 1 Ves. 461.

(*l*) Prec. Cha. 273.

(*m*) 3 P. Wms. 52.

(*n*) 2 Ves. 56.

Copy of Mr. Wilmot, the Lord Chancellor's Secretary's
Circular Letter to the Masters relating to Reports of
Guardians, and Maintenance of Infants

Bloomsbury Square, 6 Augt. 1777.

Sir,

I am directed by my Lord Chancellor to intimate to the Masters of the Court, that his Lordship finds it materially necessary in all Reports of Guardians and Maintenance of Infants, that Mention should be made in such Reports of the Age of the Infants, and of the Nature and Amount of the Infant's Fortune, and of the Evidence or Grounds on which any particular Persons are approved of as Guardians; and in Cases where Guardians are approved of the Persons and Estates of Infants, to state whether such Guardians are willing to enter into a Recognizance before the Master duly to account for such Part of the Infant's Fortunes as shall come to their Hands, as the Court shall direct.

BILL OF COSTS

ON

A PETITION,

That an Infant Heir may be directed to convey Mortgaged Premises.

Samuel Wegg, Esq.

To A. B. Dr.

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Attending you, advising on the Mortgagee being dead without having made any Devise of his real Estate, perusing his Will, and taking Instructions to draw Petition, that his Infant Heir might convey - -	0	13	4			
Drawing Petition to the Master of the Rolls, fol. 10 -	0	10	0			
Engrossing same, fol. 10, and Duty	0	5	10			
Paid answering Petition -	0	5	6			
Paid for Order - -	0	12	0			
Paid entering the same -	0	3	0			
Attending to present the Petition, and for same answered, to bespeak the Order, and afterwards examining and passing the same	0	6	8			
Making a Copy of the Order, for the Master - -	0	2	6			
Drawing State of Facts, and fair Copy for him, fol. 12 -	0	8	0			
Attending Mr. D. taking Instructions for his Affidavit of the Death of the Mortgagee in Support thereof	0	6	8			

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Drawing and engrossing his Affidavit, Duty, and paid Oath -	0	8	7			
Attending Mr. D. reading over the same, and afterwards with him to the Master's Chamber to get it sworn thereto - -	0	6	8			
Warrant on leaving State of Facts, and Affidavit, Copy, and Service	0	4	6			
Warrant to proceed thereon, Copy, and Service - -	0	4	6			
Attending thereon, when the State of Facts was allowed -	0	6	8			
Paid for a Copy of the Draught of the Master's Report, fol. 13 -	0	6	6			
Perusing and considering the same, and making several Alterations therein - - -	0	6	8			
Warrant on Report being prepared, Copy and Service - -	0	4	6			
Warrant to settle Copy, and Service	0	4	6			
Attending thereon - -	0	6	8			
Attending examining the Transcript of the Report - -	0	6	8			
Warrant to sign the Report, Copy, and Service -	0	4	6			
Paid for the Report and Transcribing	1	15	0			
Gave Master's Clerk - -	2	2	0			
Paid filing Report, and for Office Copy - - -	0	8	10			
Attending to file same at the Report Office, and afterwards for Office Copy - -	0	6	8			
Attending taking Instructions for Petition - - -	0	6	8			
Drawing Petition to confirm Report, fol. 15, and fair Copy -	0	15	0			

ON A PETITION.

689

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Engrossing the same to present, and Duty - - -	0	17	7			
Paid answering and setting down the same - - -	0	6	6			
Attending for that Purpose -	0	6	8			
Making Copy of the Report and Petition for the Master of the Rolls, fol. 28 - - -	0	9	4			
Paid on leaving same -	0	5	0			
Attending for that Purpose -	0	6	8	0	6	8
Copy of Petition for Counsel	1	0	0	0	2	6
Fee to Mr. Maddock, with Brief, and Clerk - - -	2	4	6			
Attending him - - -	0	6	8			
Attending Court, Petition heard, and Order made -	0	13	4			
Paid Court Fees and Officers	0	7	0			
Paid for Minutes - - -	0	3	0			
Paid for Order - - -	0	19	0			
Perusing same, and attending the Register, examining and passing it	0	6	8			
Paid entering same - - -	0	4	0			
Attending for that Purpose -	0	6	8			
Letters and Messengers (a) -	0	5	0			

(a) This being an Exparte Proceeding no Term Fee is allowed.

PRACTICAL DIRECTIONS

AND

REMARKS

On the Proceedings under a Petition, that an Infant Heir may convey mortgaged Premises, pursuant to the 7th Ann. Cap. 19.

THE 7th Ann. Cap. 19, reciting the Inconveniences arising by Persons under the Age of twenty-one Years, having Estates in Lands, Tenements, and Hereditaments in Trust, or by Mortgage, who could not (by the Direction of the *Cestui que Trust* or Mortgagor) convey such Lands, Tenements, or Hereditaments, to any other Person or Persons; enacts “That any Person or Persons under the Age of one-and-twenty Years, by the Direction of the Courts of Chancery or Exchequer, by Order made on the Petition of the Person or Persons for whom such Infant or Infants are seised or possessed in Trust, or of the Mortgagor or Mortgagors, or Guardian or Guardians of such Infant or Infants, or Person or Persons, entitled to the Monies secured upon any Lands, Tenements, or Hereditaments, whereof any Infant or Infants are or shall be seized or possessed by Mortgage, or of the Person or Persons entitled to the Redemption thereof, may convey and assure the same in such Manner as the Courts of Chancery or Exchequer should by Order direct, to any other Person or Persons; and such Conveyance or Assurance shall be as good and effectual as if the said Infant or Infants were at the Time of making such Conveyance or Assurance, of the full Age of one-and-twenty Years.”

And by the second Section, it is enacted—“That such

Infant or Infants, being only Trustee or Trustees, Mortgagee or Mortgagees, may be compelled by such Order to make such Conveyance or Conveyances, Assurance or Assurances, in like Manner as Trustees or Mortgagees of full Age are compellable to convey or assign their Trust Estate or Mortgages."

FORM OF THE PETITION.

" To the Right Honourable the Master of the Rolls.

" The humble Petition of William Wilshire, of Hitchin, in the County of Hertford, Attorney at Law.

" Sheweth,

" That by Indentures of Lease and Release, bearing Date respectively the 9th and 10th Days of June, 1809, made between your Petitioner of the one Part, and John Wilson, of Charing Cross, in the said County of Middlesex, Gentleman, of the other Part, your Petitioner in consideration of the Sum of 700l. to him paid by the said John Wilson did grant, bargain, sell, alien, release, and confirm unto the said John Wilson, all that Messuage or Tenement, &c. To hold the same unto and to the Use of the said John Wilson, his Heirs and Assigns, for ever, with a Proviso in the said Indenture of Release contained, for Redemption of the said Premises, on Payment of the Sum of 700l. to the said John Wilson, his Executors, Administrator, or Assigns, with Interest for the same, on the 10th Day of June, 1810.

" That the said Sum of 700l. was not paid at the Day in the said Proviso mentioned for Payment thereof, whereby the Estate and Interest of the said John Wilson, his Heirs and Assigns, in the Premises, became absolute in Law.

" That the said John Wilson departed this Life, on or about the 4th Day of February, 1815, leaving John Wilson, his eldest Son and Heir at Law, an Infant under the Age of twenty-one Years, that is to say, of the Age of

fifteen Years or thereabouts, in whom the legal Estate in the Premises is now vested.

“ That your Petitioner, being desirous of paying off the Money due on the said Mortgage, hath applied to Elizabeth Wilson, the Widow and Executrix of the said John Wilson, deceased, who hath agreed to receive the same; but the legal Estate of and in the said Premises being vested in the said John Wilson, the Infant, as aforesaid, cannot be by him conveyed without the Order and Direction of the Court of Chancery, in pursuance of the Statute in that Case made and provided.

“ Your Petitioner, therefore, prays your Honour, That the said John Wilson, the Infant, may be directed, by the Order of this Honourable Court, to release and convey the the said Premises hereinbefore, and in the said Indenture of Release comprised and mentioned, And all his Estate, Right, Title, and Interest in and to the same, unto and to the Use of your Petitioner, his Heirs and Assigns, or to such Person or Persons, and in such Manner and Form, as your Petitioner shall in that Behalf direct and appoint, upon full Payment and Satisfaction by your Petitioner of all Principal Money and Interest due, or to become due, on the said Mortgage as aforesaid.

“ And your Petitioner shall ever pray, &c.”

This Petition must be engrossed and left with his Honour's Secretary at the Rolls, and when answered, it is taken to Mr. Bird at the Register Office, and the Order thereon, passed and entered in the usual Manner.

The Order is to the following Purport :

That it be referred to Mr. Stephen, viz. one of the Masters of this Court, to examine and certify how the said Estate is vested in the said John Wilson, the Son; and whether he is an Infant, and a Mortgagee, within the Intent and Meaning of the Act of Parliament made in the seventh Year of the Reign of her late Majesty Queen Ann, intituled, “ An Act to enable Infants who are seized or

possessed of Estates in Fee, in Trust, or by Way of Mortgage; to make Conveyances of such Estates;" and after the said Master shall have made his Report, such further Order shall be made as shall be just.

A Copy of the Order must be made and left with the Master, a State of Facts prepared and left with him, supported by Affidavit. The State of Facts must shortly state the Indentures of Mortgage; that Default was made in Payment of the Money on the Day mentioned in the Proviso, by Means whereof the Estate of the Mortgagee became absolute in Law; that the Mortgagee died on the 4th Day of February, 1806, having made and published his last Will and Testament, and thereof appointed Elizabeth Wilson his Widow, his Executrix, who duly proved the same; but the said Testator not having made any Disposition of the legal Estate of and in the said mortgaged Premises, the same descended to, and became vested in John Wilson, his eldest Son and Heir at Law, who is an Infant of the Age of fifteen Years, or thereabouts. See Title, "State of Facts," *infra*.

The Mortgage Deeds, and an Affidavit of the Death of the Mortgagee, and the Age of the Infant, are the only Evidence required by the Master in support of the State of Facts.

The Affidavit must either verify an Entry from the Parish Register of the Burial of the Mortgagee, averring that the Person named in the Extract, and the Mortgagee were one and the same Person, in the usual Manner: or to the following Purport:

" In Chancery.

" In the Matter of John Wilson, an Infant.

" Joseph Wade, of Hertford, Gentleman, maketh Oath and saith, That he well knew, and was acquainted with John Wilson, late of Charing-cross, in the County of Middlesex, Gentleman, Father of the above-named John Wilson, the Infant; and that he died on the 4th Day of February, 1806,

and was buried at the Parish of St. Giles's in the Fields, in the said County of Middlesex, on the 11th Day of the same Month of February, and left the above-named John Wilson, an Infant, now of the Age of fifteen Years, or thereabouts, his eldest Son and Heir at Law: and this Deponent saith, that he was present at the Burial of the said John Wilson, the Father of the said Infant, at the Parish of St. Giles's in the Fields aforesaid."

When the Master's Report has been made and filed, a Petition must be presented to confirm the same, and that the Conveyance by the Infant may be ordered in consequence.

The Petition must state the Mortgage Conveyance, the Order of Reference to the Master, and his Report made in consequence; and the Prayer may be—"That the said Master's Report may stand absolutely confirmed; and that the said John Wilson the Infant, may be directed by the Order of this Honourable Court, to release and convey the said Premises herein-before and in the said Indentures of Lease and Release, comprised and mentioned, and all his Estate, Right, Title, and Interest in and to the same, unto and to the Use of your Petitioner, his Heirs and Assigns, or as he or they shall direct or appoint, upon full Satisfaction and Payment by your Petitioner of all the Principal Money and Interest due, or to be due, on the said Mortgage as aforesaid."

The Petition must be left with his Honour's Secretary, in the Rolls Yard, with a Copy of the Report and of the Petition, and a Fee of five Shillings; and when answered, will stand in the Paper of Petitions at the Rolls, and be heard in its Course, and the Order made as prayed. And the Order directing the Infant to convey, should be made upon the Undertaking of the other Party, to pay all necessary Costs consequential upon the Application, to be taxed by the Master (a), and the Order should be so drawn up.

(a) 10 Ves. 554. Beam. Costs. 109.

PRACTICAL OBSERVATIONS

AND

REMARKS.

INFANTS, generally speaking, can neither alien their Estates, nor do any legal Act, nor make any Deed that will bind them (*a*); but by the Provisions of an Act, passed early in the last Century, 7th Ann. c. 16, Infants who are seised or possessed of Estates in Fee in 'Trust, by way of Mortgage, are enabled upon Petition (*b*), under the Direction of the Courts of Chancery and Exchequer, and other Courts of Equity, to convey such Estates to such Person or Persons as either of these Courts shall direct: and by a subsequent Statute, Infants who are beneficial Owners of Estates, are enabled to surrender them for the Purpose of Renēwal (*c*).

The leading Points to be considered under the former of these Statutes are, that the Trust affecting the Infant must be declared *in Writing*, or be established by Decree (*d*), and be plain and *express*, and not depend wholly on the Learning of resulting Trusts, or Trusts by *implication* (*e*); and therefore an Infant is not a Trustee by means of a Contract to sell, so as to be authorized or enabled to convey under the Statute. Where an Application was for a Conveyance from the Heir of a Person who had contracted to sell, and the Object was to obtain a Conveyance in performance of the Contract, the Court refused to make a Decree against the Infant for an immediate Conveyance (*f*); but after a Decree by the Court, establishing a Trust

(*a*) 1 Bl. Com. 463.

(*b*) 8 Ves. 96.

(*c*) 29 Geo. 2. c. 31. Dick. 540.
737. 749.

(*d*) 2 P. Wms. 549.

(*e*) 3 P. Wms. 387. 5 Ves.

(*f*) 5 Vin. Abr. 541.

against an Infant, under the Doctrine of resulting Trusts, or Trusts by Implication, the Infant might be considered as a Trustee, within the Meaning of the Statute of Ann (*a*). The Infant must have *no Duty to perform*, beyond that of a *bare Trustee*, or as Lord Eldon expresses, a *dry Trustee* (*b*). An Infant has been directed to convey *Charity Estates to new Trustees*, he having no Duty to perform, and the Appointment of a new Trustee putting an end to his Duty as Trustee; but where he is to do any Act beyond the mere Conveyance, he is not within the Statute (*c*): so if he has any *beneficial* Interest in the Property of which he has the legal Estate, as Trustee or Mortgagee (*d*); or if there is any Doubt or Duties to perform a Bill must be filed (*e*); nor can any Order be made under the Statute of Anne, unless the Petitioners have the *absolute Right*; nor will the Infant be ordered, at least upon Petition, to convey to another Trustee *upon Trusts to be executed*, though he might upon a Bill praying the Appointment of a new Trustee, and a Conveyance (*f*).

This Act has been held to extend to *Copyhold*, as well as *Freehold* Lands (*g*), to Lands out of England, in the *East* or *West Indies* (*h*), or in *Ireland* (*i*), as well as to Lands in England; where an Infant was the surviving Life in a Bishop's Lease, and not beneficially interested, he has been held to be a Trustee within the Statute (*k*); and so where the Vendor of an Estate died before the Contract could be completed, his Heir at Law was held to be a Trustee within the Statute, and directed to convey (*l*). An Infant Heir of an Assignee, under a Commission of Bankruptcy, has been held a Trustee within the Statute of Anne (*m*);

(*a*) 2 P. Wms. 549.

(*b*) 17 Ves. 384.

(*c*) 2 Cox. 221.

(*d*) 4 Ves. 147.

(*e*) 2 Ves. 559. 3 Ves. and Bea. 150. 4 Ves. 147.

(*f*) 5 Ves. 240. Dick. 400.

(*g*) 7 T. R. 103.

(*h*) 2 Bro. C. C. 325. Dick. 540. 569. 5 Ves. 240.

(*i*) 8 Ves. 96.

(*k*) Dick. 737.

(*l*) Dick. 730.

(*m*) 1 Rose. 310. Buck. 478.

and so of a Messenger to whom in Bankruptcy a provisional Assignment has been made, and who died before the Choice of Assignees (*a*) ; if the legal Estate in the Infant be entailed, the proper Means for barring the Entail must be observed (*b*). An Author of distinguished Merit observes, that although this Act has been held not to extend to Trusts to be performed, requiring a *Discretion* on the Part of the Infant, that in modern Practice this latter Rule has been relaxed ; and that if the Persons beneficially interested under the Trusts to be performed, are Adult, and free from Disabilities, petition the Court for a Conveyance to their Nominees, the Court will treat the Infant as a Mortgagee or Trustee within the Act (*c*) : so an Infant being not only Heir, but entitled as one of the Next of Kin (*d*), or as one of two or more Executors, and Co-Residuary Legatee, and interested as such to a Share of the Mortgage-Money : after Payment to the other Executors has been held not to have such an Interest as to prevent the Application of the Statute, and an Order made to convey : the Receipt and Discharge of the Co-Executor leaving the Infant a mere Trustee (*d*).

It remains to observe, that the Order of Reference in the first Instance to the Master, and all the subsequent Orders, must be founded upon Petition, and not on Motion ; where a Mortgagor applied by Motion for an Order to pay his Mortgage-Money into Court, and that the Master might be directed to enquire whether the other Party was an Infant, within the Statute of Anne, the Court observing that the Jurisdiction given by the Act was by Petition, and that all Proceedings as to the latter Part of the Motion, if the Court had been taken by Surprise, and made the Order, it would have been *coram non judice*, restricted the Order entirely to the Payment of the Money into Court (*f*) : if on

(*a*) 5 Madd. 81.

(*b*) 3 Atk. 559.

(*c*) 1 Preston, Abr. 320.

(*d*) Dick. 609.

(*e*) 17 Ves. 383. 2 Cox.
422. 3 Ves. and Bea. 150.

(*f*) 8 Ves. 96.

a Reference under the Statute of Anne, the Master report that the Infant is not a Trustee, no Exception lies to his Report; but any Matter of Objection must be brought on by a Counter-Petition, at the same Time that the Report is brought on for Confirmation (*a*). Where for Instance the Master had reported that the Infant was not a Trustee within the Statute, and the Question was brought on for the Decision of the Court, the Lord Chancellor being of Opinion that he was, made an Order upon the Infant to convey (*b*).

Where an Infant Trustee refused to convey after an Order for that Purpose, an Order was made that he should convey within a Week after Service of the Order to convey, and in Case of Disobedience, that an Order must be obtained that he stand committed unless Cause shewn (*c*).

In closing these Remarks it may be proper to observe, that where an Infant conveys as a Trustee within the Statute, not being so, he will not be bound by his Conveyance under an Order; but Lord Eldon seems to express an Opinion, that if it be a Case in which he would be bound to convey, when of Age, his Conveyance being avoidable only during his Infancy, and until avoided passing the legal Estate; and no one having a Right to elect for him, whether it should be void or not, he would when he became Adult be placed in such a Situation, that if he sought at Law to avoid his Deed, a Court of Equity would prevent him (*d*).

(*a*) Dick. 395.

(*c*) 4 Madd. 128.

(*b*) Dick. 392, 395.

(*d*) 17 Ves. 384.

BILL OF COSTS

ON AN

APPLICATION,

Under the Entailed Estate, Act for Payment of Trust-Money directed to be laid out in the Purchase of Land, and settled to Uses, bar-able by Fine or Recovery.

IN CHANCERY.

BETWEEN *Edward Emily, Clerk,* PLAINTIFF,
AND
George Richards, Esq. and others, DEFENDANTS.

HILARY TERM, 1823.

CHARGE.			TAX OFF.		
£	s.	d.	£	s.	d.

16th Feb. ATTENDING the Plaintiff, advising on his Claim to one-sixth Part of 10,000l. covenanted by the Settlement made upon the Marriage of his Father the Testator, to be laid out in the Purchase of Freehold Lands of Inheritance, in the County of Surrey, as a Provision for the younger Children of the Marriage -

0	13	4	0	6	8
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Perusing the Marriage Settlement, and the Will of the Testator, directing 1000l. mentioned therein, to be paid to the Trustees (the Defendants in the Cause) in addition to the 10,000l. to be invested and settled to the same Uses as the 10,000l. therein mentioned

0	13	4
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	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Making Copy of Marriage Settlement for Uses, ten Skins	2	10	0	2	10	0
The like of the Probate of the Will, two Skins	0	10	0	0	10	0
Attending Plaintiff, advising upon his Claim to a Share, and an Application to the Court of Chancery for the Payment, as one of the Tenants in Tail to the Land directed to be purchased, the Money being paid by the Trustees into the Bank, in the Name of the Accountant General, and set apart by Order of the Court	0	13	4	0	6	8
Perusing the Papers and Proceedings in the Cause by Way of Instruction to prepare Petition	0	13	4	0	5	6
Drawing a fair Copy Petition, fol. 48	2	3	0			
Fee to Mr. Roupell and Clerk, to peruse and settle	1	3	6	0	2	6
Attending therewith	0	6	8	0	6	8
Engrossing Petition, and Duty	0	17	2			
Paid answering, and setting down	0	11	0			
Making Copy to leave with the Chancellor's Secretary	0	14	4			
Attending to leave same, and to get Petition answered	0	6	8			
Making three Copies of Petition to serve	2	13	6			
Service upon Plaintiff's Clerk in Court	0	2	0			
Service on Mr. Booth and Mr. James, Solicitors for the other younger Children	0	5	0			

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Making Brief, Copy, Petition for Counsel, five Brief Sheets	0	16	8			
Drawing one Sheet of Observations	0	6	8	0	6	8
Fair Copy to annex to Brief	0	3	4	0	3	4
Fee to Mr. Roupell and Clerk, with Brief - - -	2	4	6			
Attending him therewith	0	6	8			
Drawing and Engrossing Affidavit of Service, Duty, and Oath	0	7	1			
Paid filing, and for Office-Copy	0	6	0			
Attending Court, Order made	0	18	4			
Paid Court Fees -	0	13	0			
Paid for the Minutes -	0	3	6			
Attending Register, settling same	0	13	4			
Paid for the Order -	1	1	2			
Attending the Register, passing Order	0	13	4			
Paid entering Order -	0	3	4			
Attending for that Purpose	0	6	8			
Copy of the ordering Part for the Master - - -	0	2	6			
Drawing State of Facts, and fair Copy for the Master, fol. 60	2	0	0			
Attending searching the Register at St. Margaret's Westminster, for the Entry of the Baptism of the Plaintiff, and paid search	0	7	8			
Drawing and engrossing Affidavit, and Duty - - -	0	10	1			
Paid swearing Affidavit, and Exhibit	0	3	6			
Warrant on leaving State of Facts and Affidavit, Copy, and Service	0	4	6			
Two Copies and Service on the Solicitors for the other Parties	0	5	0			
Attending Warrant, and proceeded	0	6	8			

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Warrant to proceed, Copy, and Service	0	4	6			
Two Copies and Services on the So- licitors for the younger Children	0	5	0			
Attending thereon, and proceeded	0	6	0			
Attending Plaintiff, taking Instruc- tions for his Affidavit in Support of State of Facts -	0	6	8			
Drawing special Affidavit, engross- ing, Duty, and two Oaths	0	17	5			
Attending Plaintiff reading over same, and afterwards with him to the Master's Chambers to be sworn	0	6	8			
Drawing and engrossing Affidavit of the Execution of the Plaintiff's Marriage Settlement Duty, and Oath - -	0	8	1			
Warrant on leaving Copy, and Service	0	4	6			
Two Copies, and Service on the So- licitors for the other Parties	0	5	0			
Warrant to proceed, Copy, and Service	0	4	6			
Two Copies and Services upon the Solicitors for the other Parties	0	5	0			
Attended thereon, and proceeded	0	6	8			
Warrant for the other Parties to bring in the Claims, Copy, and Service upon the Clerk in Court	0	4	6			
Two Copies and Services upon the Solicitors for the other Parties	0	5	0			
Paid for Copy of State of Facts, and Claim of the other Parties, fol. 30	0	15	0			
Making Copy thereof for Use	0	10	0	0	10	0
Paid for Copy of Affidavit in Sup- port thereof, fol. 14 -	0	7				
Attending Warrant on State of Facts, and same allowed -	0	6	8			

ON AN APPLICATION.

703

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Drawing Instructions for Advertisement, and afterwards for same	0	6	8			
Paid for Advertisement for Persons having a specific Lien, &c. on the said 10,000l. and 1,000l. to come in - - -	0	10	6			
Paid inserting in the Gazette	1	3	0			
Attending Printer therewith -	0	13	4	0	6	8
Paid for Gazette - -	0	1	2			
Instructions for Peremptory Advertisement - -	0	6	8			
Paid for Peremptory Advertisement for the like Purpose -	0	10	6			
Attending Master for both Advertisements - -	0	6	8	0	6	8
Paid inserting Advertisement in the Gazette - -	1	3	0			
Attending Printer therewith	0	6	8			
Paid for Gazette - -	0	2	8			
Paid for Copy of Draft of Report, fol. 30 - - -	0	15	0			
Making close Copy for Use -	0	10	0	0	10	0
Perusing and considering same, and making Observations thereon	0	13	4	0	6	8
Warrant on preparing Draft of Report, Copy and Service -	0	4	6			
Two Copies and Services on the Solicitor for the other Parties	0	5	0			
Warrant to settle the Draft of the Report, Copy, and Service	0	4	6			
Two Copies, and Services on the Solicitor - -	0	5	0			
Attended thereon, and proceeded	0	6	8			
Warrant to settle the Draft of the						

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Report, Copy, and Service on the Clerk in Court - -	0	4	6			
Two Copies, and Services on the Solicitors for the other Parties	0	5	0			
Attended thereon, and proceeded	0	6	8			
Warrant to sign Report, Copy, and Service on the Clerk in Court	0	4	6			
Two Copies and Services on the Solicitors for the other Parties	0	5	0			
Attending reading over the Transcript of the Report -	0	6	8			
Paid for the Report - -	1	5	0			
Paid the Master's Clerk for transcribing, and Stamp -	4	15	0			
Gave Master's Clerk - -	2	2	0			
Paid filing Report, and for Office Copy - - -	1	6	10			
Attending Master for Report, and to file same - -	0	6	8			
Attending taking Instructions for Petition - - -	0	6	8			
Drawing and fair Copy, Petition to confirm Report, fol. 47 -	2	7	0			
Engrossing same to present, Duty, &c.	0	19	2			
Paid answering and setting down before the Master of the Rolls	0	6	6			
Attending to present, and for same when answered - -	0	6	8			
Copy of Petition for the Master of the Rolls - -	0	15	8			
Making Copy of Report to leave with his Honour's Secretary	0	15	0			
Paid Fee on leaving - -	0	5	0			
Attending to leave same - -	0	6	8			

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Making three Copies of the Petition with his Honour's Order thereon, fol. 48, each - - -	2	8	0			
Service of one Copy on the Clerk in Court - - -	0	2	0			
Service of two Copies on the several Solicitors for the other Parties	0	5	0			
Making Brief Copy of the Petition for Counsel, five Brief Sheets	1	16	8	1	0	0
Drawing Observations, one Sheet	0	6	8			
Fair Copy to add to Brief -	0	8	4			
Gave Fee to Mr. Maddock, and Clerk with Brief - - -	3	5	6			
Attending him therewith -	0	6	8			
Drawing and engrossing Affidavit of Service, Duty, and Oath -	0	7	1			
Paid filing and for Office Copy	0	6	2			
Attending at the Rolls, Petition heard, and Order made -	0	13	4			
Paid Court Fees and Officers -	0	7	0			
Paid for Minutes - - -	0	3	6			
Attending Register, settling the Minutes - - -	0	13	4	0	6	8
Paid for Order - - -	2	1	0			
Perusing Order, and attending Re- gister, passing and entering same	0	13	4	0	6	8
Paid entering Order - - -	0	8	6			
Attending to leave same -	0	6	8	0	6	8
Attending the Register for his Cer- tificate for the Sale of the Stock, and at the Accountant-General's, giving Orders for the Sale	0	6	8			
Paid Accountant-General for Certi- ficate of Sale - - -	0	7	0			
Letters and Messengers -	0	5	0			

PRACTICAL DIRECTIONS

AND

REMARKS,

On an Application under the entailed Estate Act for the Payment of Trust-Money directed to be laid out in the Purchase of Land.

FORM OF THE PETITION.

IN CHANCERY.

BETWEEN Edward Emily, Clerk, one of the six Younger Children of Thomas Emily, Clerk, deceased.

PLAINTIFF;

AND

George Richards, Esq. and John Blunt, Esq. Trustees named in the Marriage Settlement of the said Thomas Emily, Clerk, deceased, and Executors of the last Will and Testament of the said Thomas Emily, and William Emily, the eldest Son and Heir at Law,

DEFENDANTS.

To the Right Honourable the Lord High Chancellor of Great Britain.

The humble Petition of the Plaintiff Edward Emily, on Behalf of himself, and the other younger Children of the said Testator, Thomas Emily, in the Pleadings in this Cause named;

Sheweth,

That by certain Articles, made previous to, and in Contemplation of the Marriage of the said Thomas Emily, your Petitioner's Father, bearing Date the 27th Day of December, in the Year 1795, and made between William

Windham, of Diss in the County of Norfolk, Esq. deceased, and Catharine Windham, Spinster, the Daughter of the said William Windham, of the first Part, the said Thomas Emily, your Petitioner's Father, of the second Part, and the Defendants George Richards, and Thomas Blunt, of the third Part.

Reciting that a Marriage being intended, between the said Thomas Emily deceased, and the said Catharine Windham, the said William Windham did thereby covenant with the said George Richards and Thomas Blunt, that if the said Marriage should take effect, and the said Catharine Windham, or any Issue of her by the said Thomas Emily, should be living at the Decease of him the said William Windham, he the said William Windham would, in and by his last Will and Testament, give, bequeath, and direct that his Heirs, Executors, or Administrators, should within three Months next after his Decease, pay unto the said George Richards, Thomas Blunt, or the Survivor of them, his Executors or Administrators, the Sum of 10,000*l.* upon Trust, to lay out and invest the same in the Purchase of Freehold Lands of Inheritance, in the County of Surrey; and that such Freehold Lands, when purchased, should be settled to the Uses following; that is to say:

To the Use of the said Thomas Emily, deceased, your Petitioner's Father, and his Assigns, for and during the Term of his natural Life, with the Remainder;

To the Use of the said George Richards, and Thomas Blunt, and their Heirs, to preserve contingent Remainders, with Remainder;

To the Use of the said Catharine Windham, since deceased, your Petitioner's Mother, and her Assigns, for and during her natural Life, and after the Decease of the Survivor of them, the said Thomas Emily and Catharine Windham:

To the Use of all, and every, the Child and Children of the said Thomas Emily, by the said Catharine

Windham, his intended Wife, (other than and except an only Son,) in such Parts, Shares, and Proportions, as the said Thomas Emily, and Catharine Windham should by any Deed, or Instrument in Writing under their Hands and Seals, to be executed in the Presence of two or more credible Witnesses, give, direct, limit, or appoint, and in Default of such Gift, Direction, Limitation, or Appointment:

To the Use of all and every Child and Children, of the said Thomas Emily and Catharine his intended Wife, and the Heirs Male of his, her, or their Body and Bodies, lawfully issuing, equally to be divided between them, if more than one, Share and Share alike, as Tenants in Common, and not as Joint-tenants, and for want of Issue of any such younger Child, or Children, there being more than one, or in Case any such younger Child, being a Son, should happen by the Death of the eldest Son, to become the eldest or only Son, then as to the Part or Share of the said younger Children, whereof there happen to be a Failure of Issue, or of such younger Son, as shall happen to become the eldest or only Son;

To the Use of the other, or others, of the said younger Children, and to the Heirs Male of his, her, or their Body, and Bodies, lawfully issuing, with Remainder:

To the Heirs Male of the Survivor of them the said Thomas Emily, and Catharine Windham, his or her Heirs and Assigns, for ever.

And upon further Trust, until the said Sum of 10,000*l.* should be laid out and invested in the Purchase of Lands of Inheritance, as aforesaid, the same should be placed out at Interest, and the Interest thereof from Time to Time, as the same shall accrue, should be paid to such Person or Persons as would have been entitled to the Rents and Profits of the Lands to be purchased as aforesaid, in Case the same had been purchased.

That the Marriage between the said Thomas Emily and the said Catharine Windham, your Petitioner's Father and Mother, shortly afterwards took Effect; and there was

Issue of such Marriage, seven Children, viz. William Emily, the eldest Son and Heir at Law, and your Petitioner, Edward Emily the Plaintiff, and the Defendants, John Emily, Peter Emily, Mary Emily, James Emily, and Richard Emily, and no other Issue, all of whom are now living.

That the said William Windham departed this Life in the Year 1798, having first duly made and published his last Will and Testament in Writing, bearing Date the 20th Day of April, 1797, and he thereby, amongst other Bequests, gave and bequeathed unto the said Thomas Emily, your Petitioner's Father, all his personal Estate and Effects, to a very considerable Amount, reserving thereout 10,000*l.* which Testator had engaged to pay the said Thomas Emily, your Petitioner's Father, at his the Testator's Decease, in full of his Daughter Catharine, your Petitioner's Mother's Fortune; and he of his said Will, appointed the said Thomas Emily, and his Daughter Catharine, your Petitioner's Father and Mother, Executor and Executrix; and the said Thomas Emily, your Petitioner's Father, alone duly proved the said Will, and took upon himself the Burthen of the Execution thereof, and by Virtue thereof, possessed himself of the whole of the Personal Estate and Effects of the said William Windham, the Testator, to the Amount of 50,000*l.* and upwards, after Payment of all Debts and Legacies, and of the said Sum of 10,000*l.* covenanted to be laid out in Land as aforesaid.

That no Appointment of the said Sum of 10,000*l.* or the Land to be purchased therewith, was ever made by the said Thomas Emily, and Catharine his Wife, according to the Power reserved to them in and by the said Articles.

That the said Thomas Emily, your Petitioner's Father, survived the said Catharine his Wife, and departed this Life on the 13th Day of July, 1809, without having paid the said Sum of 10,000*l.* or any Part thereof, to the said George Richards, and Thomas Blunt, the Trustees named

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in the said Marriage Articles ; but he duly made and published his last Will and Testament in Writing bearing Date the 30th March, in the said Year 1809 ; and he did thereby ratify and confirm the said Articles, made previous and in order to his Marriage with Catharine, his late Wife, which particularly respect the said Sum of 10,000*l.* therein covenanted to be paid and laid out in the Purchase of Lands, for the Benefit of the younger Children of the said Marriage, in Manner therein mentioned. And the said Testator willed and directed, that his Executors therein named, should apply 10,000*l.* Part of his Personal Estate in Discharge of the said Covenant and for the Purposes aforesaid ; and the said Testator did also direct, that his said Executors should also apply a further Sum of Money, not exceeding 1,000*l.* out of his personal Estate, in Addition to the before-mentioned Sum of 1,000*l.* the easier to effect the Purchase of an Estate pursuant to the said Articles. And he appointed the said Defendants George Richards and Thomas Blunt, Executors of his said Will, who duly proved the same in the Prerogative Court of the Archbishop of Canterbury, and took upon themselves the Burthen of the Execution thereof.

That in or about Hilary Term, 1810, your Petitioner exhibited his Bill in this Court against the said George Richards and Thomas Blunt, and others, praying that an Account might be taken of the Personal Estate and Effects of the said Thomas Emily, and that your Petitioner might be paid his specific and residuary Legacy, given him in and by the said Will.

That by a Decree made on the Hearing of the Cause, bearing Date the 7th Day of June, 1813, by the Right Honourable the Master of the Rolls, his Honour was pleased to order and decree (amongst other things,) that it should be referred to Mr. Stephen, one of the Masters of this Court, to take an Account of what was due to your Petitioner, and all the other Legatees of the said Testator, Thomas Emily, your Petitioner's Father ; and also to take

an Account of the Testator's Personal Estate and Effects come to the Hands of the Defendants, George Richards and Thomas Blunt, or either of them, with the usual Directions.

That a Claim was carried in before the said Master, under the said Decree, on Behalf of your Petitioner, and the other younger Children of the said Testator, Thomas Emily, and Catharine his Wife, of the said Sum of 10,000*l.* as due to them under the Trusts of the said Marriage Articles; and also of the said Sum of 1000*l.* under the Will of the said Testator, Thomas Emily, your Petitioner's Father deceased.

That the said Master, by his Report bearing Date the 23d day of August last, which has been duly confirmed, certified amongst other Things, the Marriage Articles, and the several other Matters herein-before mentioned.

And the said Master further certified, that he had computed Interest on the said Sum of 10,000*l.* from the 13th of July, 1809, the Day of the Death of the Testator, Thomas Emily, to the 23d day of August last, the Date of his said Report, which being for three Years one Month, and ten Days at 5*l.* per Cent. per Ann. amounts to the Sum of 1643*l.* 0*s.* 8*d.* and that he had also computed Interest on the said Legacy or Sum of 1000*l.* from the 13th Day of July, 1810, being one Year after the Death of the said Testator, to the said 23d Day of August last, which being for two Years, one Month, and ten Days, at 4 per Cent. per Ann. the Rate of Interest directed by the Decree, amounts to the Sum of 84*l.* 8*s.* 7*d.* which said Sums of 1543*l.* 0*s.* 8*d.* and 84*l.* 8*s.* 7*d.* being added to the said principal sums of 10,000*l.* and 1000*l.* they make together 12,627*l.* 9*s.* 3*d.* which the said Master certified to be now due from the said Testator's Estate, to the said George Richards and Thomas Blunt, the Trustees named in the said Marriage Articles.

That under and by virtue of the said Marriage Articles, and by the said Covenant therein contained, your Petitioner, and the other younger Children of the Marriage,

are entitled to have the said Sum of 10,000*l.* and the Interest thereof laid out and invested in the Purchase of Freehold Lands in the said County of Surrey. And are also entitled, under the said Will of the said Testator, Thomas Emily, to have the further Sum of 1000*l.* and the Interest thereof, laid out and invested in the like Manner, to the Use of your Petitioner and the other younger Children, in equal Shares and Proportions, as Tenants in Common, in Tail general, with Remainder in Fee to the right Heirs of the said Thomas Emily, deceased. But your Petitioners are desirous to receive their Proportion of the Money, and conceive that they are entitled thereto, under and by Virtue of an Act of Parliament, made and passed in the 39th and 40th Years of his present Majesty, intituled, “ An Act for the Relief of Persons entitled to entailed Estates to be purchased with Trust Monies,” *Whereby it is enacted*, that in all Cases where Money under the Controul of any Court of Equity, or of or to which many Individuals or Trustees are possessed or entitled, shall be subject to be invested in the Purchase of Freehold or Copyhold Hereditaments, or both, to be settled upon any Person or Persons, in such Manner that it would be competent in Case such Money had been invested in the Purchase of real Estates for the Person or Persons who would be Tenant or Tenants of the first Estate, or Estates Tail, alone or together with the Person or Persons who would be the Owner or Owners of the particular preceding Estate or Estates therein, (if any) by Deed, Fine, or Common Recovery, or any of them, or other lawful Act in Case of Freehold Hereditaments, or by Surrender and Recovery, or either of them, or other lawful Act in the Case of Copyholds, to bar the first Estate or Estates Tail, and the Rights and Interests of all Persons in Remainder. It shall not be necessary to have such Money actually invested in Lands, in order that such Estates Tail, and Remainders over may be so barred ; but that it should be lawful for the Court of Chancery, or such Court of Equity under whom the Controul of such Monies shall be ; and, in the

Case of Trustees, to and for the said Court of Chancery, in a summary Way, upon Petition of the Person or Persons who would be Tenant or Tenants of the first Estate or first Estates Tail, and of the Person or Persons who would be the Owner or Owners of the antecedent particular Estate or Estates, (if any) in the Lands, in Case the same were purchased, such Petitioners being Adults, to order the Monies subject to such Trusts to be paid to the Petitioners, or any of them, or to be paid and applied in such Manner, and for such Purposes, as the Petitioner should appoint and the Court approve.

That the said Sum of 10,000*l.* with Interest thereon, at 5*l.* per Cent. per Ann. from the 13th day of July, 1809, the Day of the Death of the said Testator Thomas Emily, when the same became payable; and also the 1000*l.* Legacy, given by the Will of the said Thomas Emily, with Interest at 4*l.* per Cent. per Ann. from the 13th Day of July, 1810, being one Year after the Death of the said Testator, to the present Time, making the Sum of 12,627*l.* 9*s.* 3*d.* hath been retained and is now in the Hands of the Defendants, George Richards and Thomas Blunt, the Trustees named in the before-mentioned Marriage Articles, upon the Trusts therein contained, as before-mentioned and set forth.

That your Petitioner, Edward Emily, hath received, on Account of Interest due on his Share, the Sum of 76*l.* 7*s.*

That your Petitioner hath attained his full Age of 21 Years, and being entitled to one-sixth Part or Share of the said Sum of 12,627*l.* 9*s.* 3*d.* or if laid out in Lands and Hereditaments, to one sixth Part of such Lands and Hereditaments, as Tenant in Tail, with Remainder in Fee, to the Defendant, William Emily. And your Petitioner being desirous to receive and be paid such one-sixth Part of the said Sum of 12,627*l.* 9*s.* 3*d.* instead of having the same laid out in Land; and the said Defendant, William Emily, being willing to allow your Petitioner to receive the same, and to consent thereto.

Your Petitioner therefore humbly prays your Lordship to direct that one-sixth Part of the said Sum of 12,627*l.* 9*s.* 3*d.*, with Interest to be computed from the said 23d Day of August last, be paid to your Petitioner; or that your Lordship will be pleased to make such further or such other Order herein, as to your Lordship shall seem meet.

And your Petitioner will ever pray, &c.

This Petition must be engrossed on Paper, and left with the Lord Chancellor's Secretary, Mr. Farrer, in Lincoln's Inn-Fields, if intended to be heard before his Lordship, or in Court; and a Fee of 10*s.* paid for answering and 1*s.* setting down the Petition: if intended to be heard before the Master of the Rolls, it must be left with his Secretary, in the Rolls-yard, and a Fee of 6*s.* 6*d.* paid for answering and setting down the Petition, and a Copy of the Petition must be left with the respective Secretary, in either Case before the Petition is taken away.

A Copy of the Petition must be made, and served upon the Clerk in Court in the Cause, if the same Solicitor be employed for all the Defendants; or a Copy for each Defendant employing a different Solicitor; or if there be more Clerks in Court than one, a Copy must be served upon the respective Clerks in Court for each Party: the Service must be two Days before the Day appointed for hearing Petitions, by leaving a true Copy of the Petition with his Lordship's or his Honour's Order thereon, and shewing the original Petition so answered, at the Time of Service, to the Clerk in Court, *personally*; or upon his Writing Clerk, at his Seat in the Six Clerks' Office. An Affidavit of the Service must be made and filed, and an Office-Copy ready, if it is suspected that any of the Parties will not appear upon the Hearing of the Petition.

A Copy of the Petition must be made brief-wise for

Counsel, upon the Hearing of the Petition, and the Solicitor should be prepared with all the necessary Papers and his Affidavit of Service.

The Court will in every Case, however clear it may appear (a), make an Order referring it to the Master, to see whether the Parties have incumbered their Interest, before the Money is directed to be paid. The Order, therefore, is made according to the Case stated by the Petition; and it should seem that hitherto the Court has never made an Order but upon hearing. It is not improbable, but that, as it seems to be a general Rule of Practice, that however clear the Case may be, the Court will always refer it to the Master, to enquire as to Charges and Incumbrances; that at some future Period, the same Practice will be introduced as in the Case of an Infant Trustee, where the Master of the Rolls in the first Instance makes an Order of Reference upon the Petition, which is drawn up at the Register-Office, passed, and entered, acted upon, and much Delay is prevented.

The following Form of an Order, made upon an Application under this Act is given, where to the Petition before stated, the Defendants appeared and joined in the Application.

The Order recites, “ that the Petitioner, Edward Emily, one of the six younger Children of Thomas Emily, the Testator, in the Pleadings named, did *on such a Day* prefer his Petition to the Right Honourable the Lord High Chancellor of Great Britain, setting forth that under and by Virtue of the Articles made on the Marriage of the Father and Mother of the Petitioner, the Petitioner, and the other younger Children of the Marriage, were entitled to have the Sum of 10,000*l.* and the Interest thereof, laid out and invested in the Purchase of Freehold Lands in the County of Surrey; and were also entitled under the said Will of their Father, the Testator, Thomas Emily, to have the further Sum of 1000*l.* and the Interest thereof, laid out and invested in like Manner, to the Use of the Petitioner, and

(a) 6 Vcs. 576.

the other younger Children in equal Shares and Proportions, as Tenants in Common in Tail general, with Remainder in Fee to the right Heirs of the said Thomas Emily, deceased. But that the Petitioner was desirous to receive his Proportion of the Money, and conceives that he is entitled thereto, under and by Virtue of an Act of Parliament, made and passed in the 39th and 40th Years of the Reign of his present Majesty, intituled, 'An Act for the Relief of Persons entitled to entailed Estates to be purchased with Trust Monies.' That the said Sum of 10,000*l.* with Interest thereon at 5*l.* per Cent. from the 13th Day of July, 1809, the Day of the Death of the said Testator, Thomas Emily, when the same became payable, and also the 1000*l.* Legacy, given by the Will of the said Thomas Emily, with Interest at 4*l.* per Cent. per Ann. from the 13th Day of July, 1810, being one Year after the Death of the said Testator, to the 23d Day of August last, the Date of the said Master's Report in this Cause, making the Sum of 12,627*l.* 9*s.* 3*d.* had been retained by, and is in the Hands of the Defendants, George Richards and Thomas Blunt, the Executors of the Will of the said Testator; that the Petitioner, Edward Emily, had received an Account of Interest due on his Share, the Sum of 76*l.* 7*s.* That the Petitioner hath attained his Age of twenty-one Years, and being entitled to one-sixth Part or Share of the said Sum of 12,627*l.* 9*s.* 3*d.* or if laid out in Lands and Hereditaments, to one-sixth Part of such Lands and Hereditaments, as Tenant in Tail with Remainder in Fee to the Defendant, William Emily. And the Petitioner being desirous to receive and be paid such one-sixth Part of the said Sum of 12,627*l.* 9*s.* 3*d.* instead of having the same laid out in Land; and the said William Emily being willing to allow the Petitioner to receive the same, and to consent thereto. It was therefore prayed, that one-sixth Part of the said Sum of 12,627*l.* 9*s.* 3*d.* with Interest, might be paid to the Petitioner or to George Richards and Thomas Blunt, the Executors and Trustees in Trust for the Petitioner. *Whereupon* all

Parties concerned were ordered to attend his Lordship, on the Matter of the said Petition, and Counsel for the Petitioner, and for the Defendants, John Emily, Peter Emily, Mary Emily, James Emily, and Richard Emily, the five other younger Children, and for all the other Defendants this Day attending, accordingly, upon hearing the said Petition read, and what was alleged by the Counsel for the Petitioner and Counsel for the Defendants, consenting to the Prayer of the said Petition, his Lordship doth order, that it be referred to Mr. Stephen, one of the Masters of this Court, to whom this Cause stands referred, to inquire, and state to the Court the Ages of the Petitioner Edward Emily, and of John Emily, Peter Emily, Mary Emily, James Emily, and Richard Emily, the younger Children of the Testator, Thomas Emily. And it is ordered, that the said Master do also inquire and state to the Court, under the Act of Parliament passed in the 39th and 40th Years of the Reign of his late Majesty, intituled, 'An Act for the Relief of Persons entitled to entailed Estates, to be purchased with Trust Monies,' what Estate and Interest the Petitioner Edward Emily, and the Defendants John Emily, Peter Emily, James Emily, Mary Emily, and Richard Emily, would have been entitled to in the Lands to have been purchased with the 10,000*l.* and 1000*l.* in the Petition mentioned, in case the same had been laid out in the Purchase of Lands, and what Share and Interest they are respectively entitled to in the said 12,627*l.* 9*s.* 3*d.* having regard to what any of the said Children of the said Testator have received on Account of their respective Shares; and it is further ordered, that the said Master do likewise enquire, and state to the Court, whether there are any, and what Incumbrances affecting the said 12,627*l.* 9*s.* 3*d.* And after the said Master shall have made his Report, such further Order shall be made as shall be just."

The Minutes of this Order being drawn up, for which the Register will require the original Petition to be left with

him, and the Minutes being settled, the Order must be drawn up, and passed, and entered, at the Register Office. A Copy of the Order, or of the ordering Part, is to be left at the Master's Office, to whom the Reference is made.

A State of Facts may be necessary, which under the foregoing Order should state very fully, the Articles made on the Marriage of the Petitioner's Father and Mother, under which he founds his Claim; setting out the Uses in the Settlement, to shew his Right and Interest in the Lands, if a Purchase had been made; and in the Money subject to be invested in Lands, and to whom the ultimate Remainder, if any, is limited. That the Marriage between the Parties was duly solemnized, and that there was Issue, the Petitioner and five younger Children, (naming them,) all of whom are living (or if dead, their Representatives or Heirs,) and that there was no other Issue. That the said William Windham made his Will, and gave the 10,000*l.* for a Provision for the younger Children of the Marriage, as set forth in the Petition, and that he died and made the Petitioner's Father and Mother Executor and Executrix; and that the Father only proved the Will, and possessed sufficient to pay the said 10,000*l.* That no Appointment was made in Exercise of the Power contained in the Settlement. And that the Petitioner's Father survived his Wife, and made his Will, and directed his Executors to pay to the Trustees, under his Marriage Articles, the 10,000*l.*, and 1,000*l.* in Addition to the Uses of the Settlement. That a Suit was instituted, and a Decree made; and that a Claim was brought in before the Master on Behalf of the Petitioner and the younger Children; and that the Master, by his Report, found such a Sum to be due, stating the Date, and so much of the Report as relates to the Claim. That the Petitioner and the other younger Children attained their respective Ages at the several Periods, stating the Time when the same occurred by an Extract from the Survey in the Register of the Parish, and that they are all now living: that the Petitioner hath done

no Act to charge or incumber his Right and Interest in the Money, or in the Land to be purchased with the Money, concluding, in the Shape of a Charge, that the Petitioner, and the other younger Children, naming them individually, by Force and Virtue of the Act of Parliament under which the Application is made, are severally entitled to receive one-sixth Part of the Money freed and discharged of and from the Trusts declared in the Marriage Articles.

The State of Facts should be copied upon Draft Paper and left at the Master's Office, and a Warrant taken out and served, underwritten, "the Petitioner hath left a State of Facts as to the Marriage Settlement under the Order."

The Deeds must be produced, and if necessary, must be proved by an Affidavit of one of the subscribing Witnesses, the Ages of the Petitioner and the Parties must be proved by Affidavit, and the material Facts also verified in like Manner; the Decree and the Report will prove so much as is necessary from them.

The usual Warrants to proceed on the State of Facts must be taken out and served, and if necessary Witnesses may be examined; usually the Master to satisfy the Inquiry as to the Incumbrances, will require Advertisements to be inserted in the Gazette, and other Papers, for Persons having any specific Charge, Lien, or Incumbrance, on the Money as directed by the Order, and the peremptory Advertisement will fix a Day for such Claimants to come in, and it will be necessary to keep the Gazette, containing the peremptory Advertisement; if no Person brings in a Claim, the Master will make his Report. The Master prepares a Draft of this Report, and a Warrant must be taken out and served, underwritten, that "the Master hath prepared a Draft of his Report," and when that is returnable, another Warrant must be taken out and served, "to settle the Draft of the Master's Report:" this must be attended, and Warrants successively must be taken out and served to settle the Draft of the Report until the Draft is completely settled; the Solicitor then bespeaks the Tran-

script of the Report, and takes out and serves a Warrant, which he underwrites, "at which Time the Master will sign his Report;" and this Warrant, which is to give the Party an Opportunity of bringing in Objections to the Draft of the Report, is not returnable until the 4th Day, exclusive of the Day on which the Warrant is dated; if no Objections are brought in, the Master will sign the Transcript of the Report, and the Solicitor takes away the Report, paying the Report and Transcript, and a handsome Gratuity to the Master's Clerk, and files the Report at the Report Office, and bespeaks an Office Copy.

This Report must be confirmed by Petition, which should state the material Facts in the former Petition, the Order of Reference, and the Master's Report made in consequence. And it may pray

"That the said Master's Report may be absolutely confirmed; and that the said Sum of 12,627*l.* 9*s.* 3*d.* may be divided into six equal Parts; and that the Defendants, George Richards, and Thomas Blunt, the said Executors may be directed forthwith to pay to your Petitioner, Edward Emily, and also to each of them, the said John Emily, Peter Emily, Mary Emily, James Emily, and Richard Emily, the other younger Children respectively, the Sum of 2,104*l.* 11*s.* 6½*d.*, being one-sixth Part of the said Sum of 12,627*l.* 9*s.* 3*d.*, or that your Lordship will be pleased to make such farther and other Order therein as to your Lordship may seem meet.

And your Petitioner will
ever pray, &c."

The Petition must be engrossed on Paper, and left at Mr. Farrer's the Lord Chancellor's Secretary's Office in Lincoln's Inn Fields, with a Copy of the Petition, and when answered Copies are to be made, and served upon the re-

spective Clerks in Court, and an Affidavit of Service made, and an Office Copy taken to read, if necessary, upon the Hearing; and a Copy of the Master's Report must be made, and left with the Gentleman of the Chamber, with a Fee of 5s. if set down before the Lord Chancellor, or in Court: if before the Master of the Rolls, with his Secretary and a like Fee of 5s. two or three Days before the Petition will come on to be heard; the Solicitor must attend the hearing and be prepared with all the material Papers, Settlements, and the Accountant General's Certificate, if the Money has been paid into Court, and the Court will direct the Money to be paid, as prayed by the Petition; but where a Recovery would have been necessary to bar the Remainder, if laid out in Land, the Court will direct the Order not to take effect, or be of any Force, unless the Petitioner should be living on the second day of the next Term.(a)

The original Petition must be left with the Register, and the Minutes drawn up and settled, and the Order drawn up, passed and entered, as before directed; the Trustees will then pay the Money, or a Writ of Execution of the Order must be issued, which the Clerk in Court will make out: but it should seem, to avoid Expence, if the Proceedings run very long, an Order for Payment of the Money directed by the Court may be obtained by instructing Counsel to move for a short Order, naming a Day of Payment, and not forthwith; (b) and if necessary supported by an Affidavit of the Non-payment of the Money; the Order must be drawn up, passed, entered and served, and if the Money be not paid, a Writ of Execution of the last Order for Payment, (c) must be obtained from the Clerk in Court leaving the order with him for that purpose which must be served *personally*, and the Money demanded by the Party to whom the Order directs the Payment. If he cannot attend, a Letter of Attorney must be executed by the Party to whom the Money is directed by the Order to be paid,

(a). 6 Ves. 116. Ves. 125,

note.

(b) 8 Ves. 381.

(c) Dickens 689.

authorising the Person serving the Process to demand and receive the Money (a); and it would be proper to produce the Letter of Attorney when the Process is to be served, and to demand the Money by Virtue of that Authority: if the Money is to be paid into the Accountant General's Office, the Letter of Attorney is not required; but it may be useful to observe, that the Writ of Execution must be served before the Day on which the Order directs the Money to be paid. If the Money be paid, the Expence will fall upon the Party suing out the Writ; but if the Money be not then paid, an Affidavit of the non-Payment and of the Service of the Writ must be made and filed, and an Office Copy left with the Clerk in Court; and he will then make out an Attachment, which must be delivered to the proper Sheriff, and if the Party be taken upon the Process no Bail can be taken, but he must pay the Money directed by the Order without Poundage, and the Costs of the Process to be taxed by the Master if disputed.

By the 39 and 40 Geo. III. c. 56, reciting that Courts of Equity having Money under their Controul, subject to be invested in the Purchase of Lands upon Uses capable of being barred by fine, direct such Money to be paid to the Party who could thereby bar such Uses, but where subject to be invested upon Uses capable of being barred by Recovery, they refuse to direct such Payment, and compel the actual Investment thereof in Lands, for Remedy whereof it is enacted that where Money under the Controul of any Court of Equity, or of, or to which any Individuals as Trustees are possessed or intitled, subject to be invested in the Purchase of Freehold or Copyhold Hereditaments to be settled upon any Person or Persons competent by Fine or Recovery to bar the Estate tail therein, and the Remainders over had the same been so invested. The High Court of Chancery, or such other Court of Equity having the Controul of such Money, and also of Trustees, in a summary Way by Petition of the Person or Persons who would be Tenant or Tenants of the first Estates or Estates tail, and

(a) 19 Ves. 117.

of the Owner of the antecedent particular Estate or Estates if any in the Lands so to be purchased being Adults, or of Femés Covert, being first separately and severally examined in Court or by Commission and consenting, to order such Trust Money to be paid to the Petitioners or any of them, in such Manner and for such Purposes as they shall appoint, and the Court approve. And where the Monies so to be laid out are invested in Government, or real, or other Securities, all such Securities for the Purpose of this Act, are to be considered as Money, and be transferred, assigned, and disposed of under an Order in a summary Way upon Petition, and with such Examination and Consent as aforesaid, where necessary."

The Proceedings under this Act cannot be by Motion. Lord Eldon has decided that the Court has no Jurisdiction but by Petition, the Act directing a summary Course by Petition, which may be *ex-Parte*. or presented by a Party in a Cause, in which the Trust Money has been paid into Court, or over which the Court has a Controul, or in the Case of Trustees: it may be *ex-Parte*, but the Application must be made by Petition, and each Party must Petition.

A Rule laid down by the Court itself, prescribing the Mode of acting upon Petition, the Court itself may dispense with; but where an Act of Parliament has directed the Application to be by Petition, the Court has no Authority except in the Mode prescribed: where under a Covenant in Marriage Articles the Sum of 2000*l.* was to be laid out in real Estates, to be settled upon the Father for Life, with Remainders to the Children as Tenants in Common in Tail; there were Six Children, two of whom petitioned under the Act of Parliament, (a) to prevent the Necessity of a Recovery, the other Children not having presented any Petition, appeared by Counsel, and wished to have the Benefit of the Order; and it was submitted at the Bar, that it was unnecessary, and that the Act of Parliament would be complied with by coming in under the Order. Lord Eldon, in

(a) 40 Geo. 3. c. 56.

refusing the Application, observed that the Court had no Jurisdiction but upon the Petition of the Party, and that all must petition. (a)

And in the different Applications the Court seems to have adopted and laid down as a general Rule, that in every Case, however plain and clear, there must be an Inquiry as to Charges and Incumbrances; and in the Case of Land, where a Recovery was necessary, that the Remainder Man shall not be deprived of his Chance.

Where Petitions were presented under this Act, authorizing the Court to order Money in Trust, to be laid out and settled, to be paid to the Person, who as Tenant in Tail of the Land, could bar the Remainder: the Lord Chancellor referred to and adopted the Construction put upon the Statute by Lord Rosslyn, (b) to prevent the Party getting the Money unless he should be living on the second Day of the ensuing Term. (c) And where a Petition prayed an absolute Transfer of Bank Annuities from the Sale of Estates, of which the Petitioner was Tenant in Tail, with Remainder over, which had been sold under an Act of Parliament, directing the Money produced by the Sale to be invested in other Lands, to be settled to the same

(a) 9 Ves. 452.

(b) In *Lowton v. Lowton*, 22d July, 1800, upon a Petition under Lord Eldon's Act, by the Tenant for Life, and the first of several Tenants in Tail in remainder, the Lord Chancellor (Lord Rosslyn) said he had consulted Lord Kenyon, Lord Eldon, and the Master of the Rolls, as to the Manner in which that Act was to be executed; and they had agreed that it would be proper not to order the Money to be paid out of Court until such Time as the Tenant in Tail might actually have suffered a Recovery of the Land. His Lordship accordingly made the Order, but directed that it should have no Effect unless the Tenant in Tail should be Living on the second Day of the next Term, and intimated that it would be proper to make a general Order upon the Subject. 5 Ves. 12, note a.

(c) 6 Ves. 116, and 576.

Uses: Lord Alvanley, then Master of the Rolls, made an Order, directing an Inquiry, whether there were any Incumbrances affecting the Residue of the Bank Annuities, declaring that in Case there were no Incumbrances, the Petitioner would be entitled to a Transfer; but that the Order should not take effect, or be of any Force, unless the Petitioner should be living on the second Day after Easter Term then next.(a) And the Petition coming on upon the Report that there were no Incumbrances, the Lord Chancellor declared his Approbation of that Inquiry, and made an Order in both Petitions.

And afterwards upon a similar Application, Lord Eldon said, that Lord Rosslyn had settled that *there must always* be a Reference to the Master, to inquire whether the Parties had in any Manner incumbered their Interest in the Money; and upon a Suggestion by Counsel, that in a plain Case that Reference might be dispensed with, his Lordship declared, that he never would dispense with it, observing, that in the plainest Case it cannot, without the Inquiry, appear whether the Parties have incumbered their Interests: and the Order accordingly directed an Inquiry, whether the Parties are entitled, and under and subject to what Charges and Incumbrances(b). And his Lordship observed upon a subsequent Application, that a Petition of this Kind should never be heard upon the last Day of Term; but, to obtain the Order in Term, the Application must be made at such a Period of the Term, as to give sufficient Time for a Recovery to be suffered.(c)

If the Subject involves a doubtful Question, as what Estate the Party is entitled to, the Court will not decide it upon an *ex Parte* Petition in a summary Way, in the Absence of all the Parties entitled; where a Question arose, whether the Party applying was Tenant for Life, or Tenant in Tail, upon an *ex-parte* Petition, the Master of the Rolls would not, under the Statute decide the Right, (notwithstanding the Inclination

(a) 8 Ves. 609.

(c) 8 Ves. 609.

(b) 6 Ves. 576. 3 Ves. and
Bea. 11.

of the Court might be when the Question came on to be discussed, to hold the Party to be Tenant in Tail) observing that the Act for the Relief of Tenants in Tail applies only to Cases where the Right is clear and indisputable (a).

If in proceeding under the Order of Reference, an original Will is to be produced, (for the Probate cannot be read in Evidence to shew a Title to Land) an Application must be made to the Prerogative Office in London, if the Will has been proved there, and a Messenger will attend with the Will; but if the Will has been proved in the Country, to save the Expense of attending with the Will from the Registry of the Diocese, or Peculiar, &c. an Application must be made by Motion or Petition, (see Title Petition) for an Order upon the Register, or other Persons in whose Custody the Will is, to deliver out the original Will to a proper Person, to be produced in Court, or before the Master, upon giving Security to be approved by a Master for returning the Will not *erased or defaced*. The Order is usually made upon Notice, and if any other Parties are interested, their Consent should be obtained, and an Infant should not oppose: the Application should be supported by Affidavit, stating sufficient to shew the Necessity of producing the Will, and that it will be material and necessary to produce the original Will at the Hearing, or before the Master; that an Application has been made to the Register, or proper Officer of the Diocese, or Peculiar, in whose Custody it is, for the Delivery out of the Will, to produce in Court, &c. to save the Expense of a Messenger from the Diocese, &c. and an Offer to give the usual Security for returning the Will to the Registry, and also the Refusal of the Officer to part with it.

The Service of the Order must be *personal*, and the usual Course of Proceedings to enforce Obedience pursued (b).

(a) 6 Ves. 156. 11 Ves. and Bea. 11.

(b) Forder v. Wade and others, 9th Dec. 1793. In Pyke v. Webb, the original Will and Depositions in the Bishop's Court at Wells, were produced by Subpœna duces tecum, before Commissioners, Mich. 1783. MSS. Dick. 485.

BILL OF COSTS
ON THE
RE-HEARING A CAUSE.

IN CHANCERY.

Between John Burford, Esq. **PLAINTIFF,**
AND
Richard Arnold, **DEFENDANT.**

HILARY TERM, 1823.

	£	s.	d.
Perusing the Decree made on the Hearing this Cause, advising on the Propriety of a re-Hearing, &c., and taking Instructions to draw Petition	0	13	4
Paid entering Caveat to prevent signing the Decree	0	5	0
Attending the Clerk in Court, instructing him	0	6	8
Drawing Petition for re-Hearing, and fair Copy, fol. 60	3	0	6
Fee to Mr. Maddock to settle and sign, and Clerk	2	4	6
Attending him	0	6	8
Fee to Mr. Sugden and Clerk, to peruse and sign the Petition	2	4	6
Attending him	0	6	8
Engrossing the Petition, Stamp, &c. to present Copy thereof for the Lord Chancellor, to accompany the same	1	5	10
Attending to present Petition, and afterwards for same	1	0	0
Making Copy of the Decree for him, Eighty-two Sides	2	14	8
Paid answering the Petition	1	5	0
Paid filing and Order, Copy, and Service	0	9	0
Paid Clerk in Court Fee for signing Consent to pay such Costs as should be awarded by the Court	0	6	8
Paid setting down the Cause to be re-heard	0	1	0

	£	s.	d.
Paid (a) the Deposit to the Register thereon	10	0	0
Attending for that Purpose -	0	6	8
Paid for the Receipt - -	0	1	0
Drawing and engrossing Affidavit of Service, Duty, and Oath - -	0	7	7
Paid filing the same, and for Office-Copy	0	6	7
Making two Copies of the Petition as Brief for Counsel, six Sheets each - -	2	0	0
Fee to Mr. Sugden, with Brief of Petition, and with his former Brief in the Cause, and Clerk	5	7	6
Attending him - -	0	6	8
Fee to Mr. Maddock and Clerk, with Brief	3	5	6
Attending him - -	0	6	8
February 3d. Attending Court, Cause in the Paper, but not called on -	0	10	0
----- 10th. Attending Court, when the Cause was heard, and the Decree directed to be varied, Clerk in Court, and Solicitor	1	0	0
Paid Court Fees - -	0	12	6
Paid for Copy Minutes - -	0	3	0
Perusing the same, and attending the Register settling them - -	0	13	4
Paid for Order - -	4	18	6
Perusing the same, and attending examining and passing - -	0	13	4
Paid entering Order - -	0	19	0
Attending to leave Order to be entered, examining and taking same away - -	0	6	8
Attending the Register for the Return of the De- posit, giving him a Receipt on taking same Back - -	0	6	8
Paid Poundage - -	0	10	0
Term Fee, Clerk, and Solicitor -	0	16	8
Letters and Messengers - -	0	5	0

(a) If the Deposit is ordered to be returned, this Charge of Course will not stand.

THE BILL OF COSTS

OF THE

DEFENDANTS,

Of inrolling the Decree, and of the Motion to vacate the same.

TRINITY TERM, 1823.

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Attending instructing the Clerk in Court, to inrol the Decree	0	6	8	0	6	8
Drawing and engrossing Docket of Inrolments, fol. 287 -	9	11	4			
Paid for Docket Sheets and Duty	2	4	10			
Paid searching Records -	0	4	0			
Paid to Clerks examining -	0	17	0			
Paid signing by the Lord Chancellor, and for Bag-Bearer's Fees, and answering Petition, and for private Seal -	1	8	0	0	16	9
Engrossing Inrolment on Rolls		11	4			
Paid for Rolls -		10	0			
Term Fee and Letters -	1	1	8	1	1	8

MICHAELMAS TERM, 1824.

The Plaintiff's Solicitor having served a Notice of Motion to vacate the Inrolment of the Decree, attending searching if Affidavit filed and Paid -

Paid for Office-Copy -	0	8	0			
Abbreviating same for Counsel, 1½ Sheets -	0	5	0	0	1	8
Copy Notice of Motion to annex	0	1	0			
Attending Mr. Sugden therewith	0	6	8			
Gave him and Clerk -	2	4	6			
Nov. 13. Attending Court Order to vacate Inrolment made	0	13	4			

BILL OF COSTS

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Term Fee and Letters -	1	1	8			
HILARY TERM, 1823.						
January 23d. Attending Court	0	13	4	0	13	4
Drawing Affidavit of Mr. Bostock, fol. 5. -	0	5	0	0	1	0
Engrossing and Duty -	0	5	2	0	1	2
Attending to swear same -	0	6	8			
Paid Oath -	0	1	0			
Paid filing and for Office-Copy	0	5	10			
Briefing same and the Affidavit of Mr. Willshire, two Sheets	0	6	8	0	5	4
Further Fee to Mr. Sugden	1	3	6			
Attending him therewith -	0	6	8			
Term Fee and Letters -	1	1	8			
EASTER TERM, 1824.						
June 3d. Attending Court, Motion heard, and Order made	0	13	4			
Paid for Copy Minutes -	0	2	6	0	2	6
Attending to settle same	0	13	4	0	13	4
Term Fee and Letters -	1	1	8			
TRINITY TERM, 1824.						
Paid for Order -	0	19	6			
Attending to pass same -	0	13	4	0	6	8
Attending to enter same	0	6	8	0	6	8
Paid entering -	0	3	6	0	1	0
Making Copy for the Master	0	2	6			
Drawing these Costs, fol. 9 -	0	6	0			
Warrant on leaving Copy, and Service	0	4	6			
The like to tax -	0	4	6			
Attending taxing -	0	6	8			
Paid Clerk in Court -	0	6	8			
Term Fee and Letters -	1	1	8	1	1	8
Paid for Certificate -	1	10	6			
Office Copy -	0	5	0			
Attending -	0	6	8			

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Præcipe for Subpoena, attending be- speaking, and for same -	0	6	8			
Subpoena -	0	8	0			
Personal Service -	0	10	0			

Costs of exemplifying a Decree.

Attending Clerk in Court, giving Instructions for Exemplification of the Decree of Proceedings, and leaving with him the Office Copy of the Depositions - - -	0	6	8
Paid Clerk in Court searching for Record and Search - - -	0	14	4
Paid him exemplifying the Bill, Answers, Repli- cations, and Depositions, 24 Skins (at 1l. 13s. 4d. containing 16 Office Sheets each Skin) - - -	39	14	0
Paid for 24 Skins of Embossed and Bordered Vellum - - -	12	0	0
Paid Stamp Duty for 24 Skins -	72	0	0
Paid for Silk String, pleating, ruling, and Tin Box	0	15	0
Paid for two Masters on exemplifying at 2s. per Skin, each Master - - -	4	16	0
Paid Clerk at the Public Office -	0	5	0
Fee on attending the Masters to examine the Exemplification with the Records, at 6s. 8d. every 3 Skins - - -	3	13	4
Paid the Examiner his Fee for attending with the Record of the Depositions in Town	0	10	6
Drawing and engrossing Dockett, Master's Certi- ficate, and Stamp - - -	2	0	0
Paid Hanaper Fee on Sealing -	1	8	10
Paid Ditto for 5, inspeximus - - -	0	1	8
Paid the Lord Chancellor's Purse Bearer Dockett Fee - - -	0	10	0
Paid the Bag Bearer - - -	0	5	0
Paid for Red Leather and Patent Gilt Case, Lock and Key - - -	0	12	0

PRACTICAL OBSERVATIONS

AND

REMARKS.

IF either Plaintiff or Defendant be dissatisfied with the Judgment pronounced at the Hearing in Court, or at the Rolls, he may re-hear the Cause, or may appeal from a Decree made by the Master of the Rolls, or by the Vice-Chancellor, to the Lord Chancellor; a Decree made by his Honour may be re-heard before him: so if a Cause be heard before the Vice-Chancellor, or by the Lord Chancellor, it may be re-heard by his Lordship; but a Cause heard by the Master of the Rolls, and afterwards re-heard there, can be reviewed only by Appeal (*a*): it seems to be now settled that there can be no re-hearing in Court, of an Appeal from the Rolls (*b*), though Cases to the contrary may be found (*c*).

Lord Eldon, in hearing an Appeal from a Decree made by *Lord Alvanley*, late Master of the Rolls, in a very difficult and doubtful Case, expressed much Doubt whether a Cause heard originally at the *Rolls*, and re-heard there, could be brought before the *Lord Chancellor*, by Appeal, at the Instance of the same Party; his Lordship seems to have been doubtful whether it ought not to go up to the House of Lords at once; and after entering very fully into the Question, concluded a very learned Judgment, by observing that if it should be thought advisable to prevent an Appeal in such Cases *in future*, he was of Opinion that it would be much better done by some Rule of Practice, than by taking upon himself, in the first Instance in which

(*a*) 8 Ves. 423, 561. 2 Ves. and Bea. 359.

(*b*) 13 Ves. 421. 2 Cox 158.

(*c*) 3 Chan. Ca. 200. Dick. 426.

it occurred in his Lordship's Experience, to decline the Duty of hearing and considering the Case. The Petition was argued, and the Decree made at the Rolls affirmed (a).

There have been Instances of several re-hearings before the *Lord Chancellor* upon the Application of the same Party (b). *Lord Hardwicke*, on a Re-hearing altered his Opinion, upon which Occasion, that noble and learned Judge was pleased to observe, "These are the Reasons which induced me to alter my Opinion, and I am not ashamed of doing it; for I always thought it a much greater Reproach in a Judge to continue in his Error than to retract it" (c). And in reviewing the Judgment of a learned Predecessor, the succeeding Chancellor has declared, "that in Cases where his Lordship was not fully satisfied, he would never reverse a former Decree." (d) There seems to be no Instance of a Refusal to hear an Appeal, where the *Lord Chancellor*, knowing nothing of the Case, cannot be presumed to be informed of the Merits, as in re-hearing a Cause, heard by himself.

A re-Hearing seems to be discretionary: it is, however, usually allowed as of Course upon the Certificate of Counsel (e). *Lord Thurlow* refused to re-hear an Appeal, knowing as it is said, the Nature of the Case (f); and all the Merits, and that there was no probability of any new Argument (g); generally there can be only one re-hearing (h).

The first Object of Attention, is to prevent the Decree from being signed and inrolled, which would preclude the Party from all further Proceedings to appeal or re-hear the Cause, in the Court of Chancery, and the Appellant after Inrollment would be obliged to Appeal to the House of

(a) 8 Ves. 561.

(e) 18 Ves. 325. Ambl.

(b) 1 Vern. 90. 60. 2 Chan. 191. 17 Ves. 381.

Rep. 85. 3 Chan. Ca. 78. 1

(f) 2 Cox Rep. 158.

Bro. P. C. 90. 2 Ch. Ca. 200.

(g) Harg. Jur. Arg. 451. 3

1 Bro. P. C. 150.

P. Wms. 8. 2 Cox Rep. 158.

(c) 2 Atk. 439.

(h) 16 Ves. 514.

(d) 2 P. Wms. 258.

Lords, or file a Bill of Review (*a*), though only one of several Defendants has inrolled the Decree (*b*).

To prevent the signing and inrolling the Decree, a Caveat must be entered with the Secretary of Decrees; this is done by giving Instructions to the Clerk in Court, who will leave a Note in Writing in the following Form, with Mr. Roberts, the Bag-bearer of the Six Clerks' Office :

IN CHANCERY.

Between William Willshire, Plaintiff;
and

Leonard Hampson, Defendant.

“ Decree made by his Honour, dated 5th Feb. 1823.

“ Enter a Caveat against inrolling this Decree.”

George Jackson, Clerk, 2d March, 1823.

The Effect of this Caveat is the staying the Signing and Inrollment of the Decree, for twenty-eight clear Days, to be computed from the Day of the Docket being presented to the Lord Chancellor to be signed, and of Notice given by his Secretary to the Clerk in Court on the other Side (*c*); for every Decree before it can be inrolled, must be signed by his Lordship, whether the Decree be made by the Master of the Rolls, the Vice Chancellor, or by a Common Law Judge sitting for the Lord Chancellor; and if the Decree has not been regularly passed and entered within the Time prescribed by the standing Orders of the Court, directing that all Decrees, Dismissions, and Interlocutory Orders, pronounced in Michaelmas and Hilary Terms or Vacations, be entered before the first Day of Michaelmas Term then next, and all in Easter and Trinity Terms, before the first Day of Easter Term next ensuing, an Order to enter the Decree *nunc pro tunc* must be previously obtained, passed, and entered (*d*): if the Inrolment is gained by Surprise, the Court will vacate it (*e*).

(*a*) 3 P. Wms. 371.

(*d*) Ord. Can. Bea. Ed.

(*b*) 1 Sch. and Lefr. 234.

290.

(*c*) 1 P. Wms. 608. Ord.

(*e*) 1 Turn. Rep. 178.

Can. Bea. Ed. 309. 3 Meri. 13.

The Course of Practice to re-hear a Cause is by Petition, presented by a Party in the Cause, and never by Motion (*a*) ; and the Petition ought to state all the special Facts and Circumstances, and the Points upon which it is sought to re-hear the Cause (*b*). A Petition for re-Hearing has been ordered to be taken off the File, on the Ground of its making a different Case from that on which the Decree was pronounced (*c*). For this Purpose, the Counsel's Brief at the Hearing, the Decree, and such other Papers and Proceedings in the Cause, as may be requisite for preparing the Petition, should be left with one of the Counsel in the Cause : it will in general be found more convenient to the Solicitor to leave the drawing the Petition to Counsel, than to prepare it himself ; but if the Solicitor should be inclined to prepare the Draft of the Petition, he will find in another Part of this Work, under the Title " Petitions," Precedents of Petitions of re-Hearing and Appeal, drawn and settled by Counsel of distinguished Abilities ; the Draft of the Petition must be laid before one of the Counsel for the Appellant when the Decree was pronounced : the Fee is proportioned to the length of the Petition and the Intricacy of the Case, generally three or four Guineas : usually the leading Counsel is consulted, for as there must be two Counsel to sign the Petition, one whereof is of good Note in Court, or who has been Counsel in the Cause (*d*), it is usual to take the leading Counsel for one, and the other Counsel is at the Choice of the Solicitor, and they must certify at the Foot of the Petition, that they conceive the Cause is proper to be re-heard. The Petition thus signed, must be engrossed upon Half-Crown stamped Paper, and left with Mr. Farrer at his Office in Lincoln's-Inn Fields, if it is to be re-heard in Court, before the Lord Chancellor, or the Vice-Chancellor, and Copy of the Petition must be left with him ; when the Petition is answered, a Fee of one Pound five Shillings is paid : by the Standing Orders a

(*a*) 18 Ves. 320.

(*c*) 1 Meri. Rep. 35.

(*b*) 1 Sch. and Lefr. 398.

(*d*) 1 Px. Alm. 25.

Party appealing from a Decree, or obtaining a Re-hearing of a Cause, or of Exception, must, upon the Re-hearing of a Cause, deposit in the Hands of the Register, the Sum of Ten Pounds, and upon the Re-hearing of an Exception, the Sum of Five Pounds, to be paid to the adverse Party, if the Decree or former Order is not varied in some material Point; and also such further Costs as the Court shall direct (*a.*) The Petition is to be taken to the Senior Register's Seat; and as the Order upon the Petition directs Ten Pounds to be deposited with the Register in a Week, that Sum must be paid to the Register at the Time of leaving the Petition, and a Receipt taken; and in general the Clerk in Court is required to sign an Undertaking to pay such further Costs subsequent to the Decree as the Court shall direct: it is requisite, therefore, to take the Petition to the Clerk in Court for the Petitioner, to obtain his Signature thereto; the Register will then draw up the Order for setting down the Appeal, next after the Re-hearings and Appeals already appointed, of which the Order directs Notice to be given forthwith. The Petition itself is to be filed with the Register, and one Shilling is to be paid for setting down the Petition; the Order must be drawn up, passed, and entered, for which Directions have been already given, and served upon the adverse Clerk in Court, by delivering to and leaving with him or his Writing Clerk at the Six Clerks' Office, a Copy of such Order, shewing the original Order at the same Time. It has been said by the Court that two Days' Notice is sufficient, (*b.*) but it is advisable to serve the Order as soon as possible. Fair Copies of the Decree sought to be re-heard, and such other Proceedings as are stated in the Petition, must be made and left with the Lord Chancellor's Gentleman of the Chamber, with a Fee of five Shillings, four or five Days before the Petition comes on: and the Solicitor should search the Register's Book of Causes, to learn how the Appeals and re-Hearings

(*a.*) Ord. Can. Bea. Ed. 316. (*b.*) 1 Ves. j. 45.

11 Ves. 173.

stand, that he may be ready when the Cause is heard; and he should prepare his Briefs for Counsel, the former Brief at the Hearing of the Cause, with the Decree to be reheard, and a Copy of the Petition will be sufficient, with such Instructions as the Solicitor may think proper to add, and Fees must be given adequate to the Difficulty of the Points made by the Petition. The adverse Solicitor, upon being served with the Order for setting down the Petition, will of course search at the Register Office to see if the Deposit has been made, and the Undertaking of the Clerk in Court to pay the discretionary Costs given, and he will bespeak a Copy of the Petition filed with the Register, and having obtained an Office Copy, he will of course advise with his Counsel, the Course it may be proper to take for opposing the Petition, and give such Instructions as he may be advised, which with the former Brief at the Hearing, a Brief Copy of the Petition and the Decree, will be sufficient. He must also search from Time to Time at the Register Office, to inform Himself how the Re-hearings and Appeals stand. The Petitioner's Solicitor having given his Briefs, and being prepared with all the Papers and Proceedings, when the Petition comes on must attend the Court, and when the Petition has been called on and heard, the Deposit is then disposed of, the Fees of Court amount to 13s. 6d. and if the Order made upon the Petition is in his Favour, he immediately bespeaks the Minutes of the Order at the Register-Office, and proceeds to settle them, and draw up the Order, for which very full Directions have been already given. The Deposit is to be applied for as ordered by the Court; generally the Deposit is ordered to be paid to the Party prevailing, in either Case it is to be obtained by producing the Order to the Register, who after deducting 1s. in the Pound, his Fee for Poundage, will pay the Residue of the Money to the Party to whom the Order directs it to be paid, and whether the Deposit be directed to be divided, or paid back to the Petitioner, or to the other Side, the Mode of applying for it is the same;

if the Court should give Costs *ultra* the Deposit, the Order drawn up, passed, and entered, must be taken to the Master to whom it is referred, and a Bill of Costs left, and a Warrant "on leaving" taken out and served; and afterwards a Warrant "to proceed on the Bill of Costs," and attended by the Clerk in Court and Solicitor for the Party taxing the Costs, and the Costs when taxed, must be reported as usual, and enforced by Order or Subpœna, and the Process for the Recovery of the Costs pursued, for which Instructions will be found in another Part of this Work. The Solicitor for the Petitioner should be provided with an Affidavit of Service of the Order for setting down the Petition, and to obviate any Inconvenience, the adverse Solicitor would act wisely in being provided with an Affidavit of having been served with the Order to set down the Petition (this Precaution was found of great Service, in enabling such of the Defendants who had been served to apply for Costs, where Exceptions to a Report had been taken, and only two of the Defendants had been served with the Order, and the Party excepting failed in appearing to support the Exceptions) (a). The Directions given by the Court upon hearing the Petition must be carried into effect, whether the Decree be confirmed, reversed, or varied in Part only. The Instructions heretofore given for prosecuting Decrees, it is presumed, will sufficiently inform the Solicitor how to conduct the further Progress of the Cause, in that Respect.

A Petition of re-Hearing before the Master of the Rolls is, *mutatis mutandis*, the same as before the Lord Chancellor, the Petition is left with his Honour's Secretary, in the Rolls' Yard, the Order is drawn up with the Rolls' Register, and set down amongst his Honour's Causes, and heard at the Rolls.

A Petition of Appeal from a Decree made by the Master of the Rolls, to the Lord Chancellor, differs in Form only,

(a) Elliot v. Booth, Trin. 1802. MSS.

from a Petition of Re-hearing. The Instructions given for the one, will serve in all Respects for the Prosecution of the other.

If the Parties should come to a Compromise, the Petition of Appeal or Re-hearing may be withdrawn on Motion and Consent (*a*).

Having detailed the Practice at large, it has been thought sufficient to close this Head, by introducing some cursory Observations upon the Subject in general of re-Hearings and Appeals.

It has been observed by Lord Eldon, that an Order made by a preceding Lord Chancellor, ought not to be heard upon Minutes, the Order should be first drawn up (*b*). And as it has been before observed to be in the Discretion of the Court, whether or not it will grant a Re-hearing, it is equally so, whether the Court will do any thing thereon ; but the Court has refused to discharge an Order for a Re-hearing, though at the Distance of twenty-four Years (*c*).

The Court will sometimes upon a Petition to rectify Minutes, refuse to make any Order and direct a Re-hearing, if the Point made be of Importance, and the Subject-Matter is proper for a Re-hearing.

But upon further Directions, where the decretal Order appears to be wrong, it is sometimes by Consent, varied by a Petition of Re-hearing (*d*).

A Plaintiff applying by Petition to re-hear, the Cause is open as to the whole and every Part, with respect to the Defendant ; but with respect to the Plaintiff, it is only open as to those Parts complained of in his Petition (*e*). But if the Petition be against the Decree in general, though special Reasons are assigned, the whole is open (*f*), and the Court

(*a*) 10 Ves. 30.

(*e*) 1 P. Wms. 300. Prac.

(*b*) 15 Ves. 72. 2 Atk. 152. Reg. 370.

(*c*) 3 P. Wms. 28. n.

(*f*) Sel. Ca. in Chan. 13. 14.

(*d*) 13 Ves. 324.

has permitted additional Evidence to be gone into upon a Re-hearing (a).

Upon Re-hearing, a Cause which was originally heard before the Lord Chancellor, must be opened as a Case (b).

On an Appeal from the Rolls to the Lord Chancellor, the Appellant is at Liberty to read new Proof, and offer what he can against the Decree (c), and Liberty has been given to prove Exhibits, *viva voce*, not proved on hearing at the Rolls (d). In another Case it was held, that on an Appeal, the whole Case is open; but on a Re-hearing only so much as is petitioned against (e). It seems, however, to have been determined since, that on an Appeal from the Rolls, the Appellant may read new Evidence, provided he will give up his Deposit (f).

It has been observed by Lord Eldon, that upon Appeals and Re-hearings, it has often been contended, that the Parties may go into fresh Evidence, and that has been in some Instances allowed, as in *Dashwood v. Lord Bulkely*: but that it comes to a Question of Costs, and the Rule should be laid down, that you may add to Testimony upon Appeal, still the Party if he succeeds ought to indemnify the other, for not having that Evidence at the Time it ought to have been read (g).

None but Parties are intitled to an Appeal. Where there has been a Decree *nisi*, and on Defendant's not appearing made absolute, two Years afterwards the Cause was ordered to be re-heard on Terms (h); but the Decree should be complete and absolute, before there can be a Petition to re-hear (i). So where a Bill was filed in 1775,

(a) 1 Ves. and Bea. 153. 10
Ves. 237, 1 Meri. 35.

(b) 2 Atk. 40.

(c) 1 Vern. 464. 443. Prec.
Ch. 295. 496.

(d) 1 Ves. and Bea. 153.
1 Meri. 38. n.

(e) Prac. Reg. 370.

(f) 2 Atk. 408.

(g) 1 Ves. and Bea. 152.

10 Ves. 237.

(h) Ambl. 89. 9 Ves. 173.

18 Ves. 319, 496.

(i) 2 Atk. 152.

and not brought to a Hearing till 1799, and Defendant then under Coverture, not appearing, a Decree *nisi* was taken, and afterwards made absolute: the Cause was set down by Defendant upon a Petition of Re-hearing before Lord Eldon in 1803, and upon the Undertaking to pay such Costs as the Court should think proper, the Cause was re-heard (a); there can be no Appeal or Re-hearing for Costs, only but under special Circumstances (b).

But if there be a Decree, by Default, and a Petition to re-hear, if the Party in Possession of the Decree, does not attend the Re-hearing, it should seem the Bill will be dismissed with Costs, as to the Petitioner (c).

A re-Hearing has been permitted after a Decree by default made absolute for setting aside a Lease of a Charity Estate, and directing an Account of the actual Rent, the Account taken, and the Master's Report prepared upon Terms of Payment of Costs of the Application, and the previous Costs of the Master's Office, and not disturbing the Proceedings before the Master, reserving the Consideration of future Costs in the Master's Office, until the Re-hearing. But the Court upon the Application to re-hear, refused to engraft an Order for Payment of the Money, appearing upon the Draft of the Report to be paid in; and as to any other Matter of Relief, Lord Eldon observed, that he could not permit a Re-hearing by special Application to stand on better Terms, than the Party under the ordinary Right to present such a Petition would have had (d).

If after Hearing a Witness is convicted of Perjury, Advantage may be taken out of it, on a Re-hearing (e).

It seems to have been determined, that an Appeal or a Re-hearing will not lie from a Decree made by Consent, though the Party did not in fact consent, his Remedy is against his Counsel, &c. (f) Lord Eldon entertained a Doubt, whether by consenting to an Order consequential to a De-

(a) 9 Ves. 172.

(d) 18 Ves. 319.

(b) 1 Bro. C. C. 140. 1
Edm. 17.

(e) 2 Vern. 463.

(f) Ambl. 229. 1 Anst. 80.

(c) Sel. Ca. in Chanc. 50.

2 Ves. 488.

cree, the Party so consenting precludes himself from the Right of Appeal (*a*). But where an Agreement was signed by the Parties, and by Consent made an Order of Court, to submit to such Decree as the Court should make, and that neither Party should bring an Appeal; yet the Cause was allowed to be re-heard (*b*).

But it should seem, that an Order for a Cause to stand over, with Liberty for the Plaintiff to amend his Bill, by adding Parties is in its Nature an Order by *Consent*, and therefore cannot be appealed from; if the Plaintiff thinks there is no Want of Parties, he should let his Bill be dismissed, for this Reason, and then Appeal (*c*).

A Re-hearing is the proper Mode of impeaching a Decree, not signed and inrolled for Error (*d*).

The Court would not re-hear a Cause after a Decree signed and inrolled, although the Cause had been open since the Inrolment (*e*). So if a Decree be inrolled, there the Cause cannot be re-heard, and is no Remedy but by Bill of Review; which must be on Error apparent on the Face of the Decree, or Matters subsequent to the Decree, as a Release, or a Receipt discovered since (*f*).

The Orders of Court directed that a Re-hearing shall not stop or hinder Proceeding on an Order or Decree appealed from, without the special Order of the Court (*g*); and if a Special Application fails, it is generally with Costs (*h*).

Upon an Application by a Defendant that the Proceedings under the Decree should be stayed, until an Appeal should be presented to the House of Lords: Lord Eldon, in deciding upon the Application, observed that it was difficult to state what was the Law with Reference to this Point upon Appeal from the Court of Chancery; but that, that

(*a*) 1 Meriv. 35.

(*f*) 3 P. Wms. 371. 16,

(*b*) 3 P. Will. 242. 19 Ves. 206, 216.

550.

(*g*) Ord. Canc. Bea. Ed.

(*c*) 2 Cox. Rep. 156.

266. 14 Ves. 585. 17 Ves. 380.

(*d*) 5 Ves. 509.

18 Ves. 452.

(*e*) 2 Ch. Rep. 361.

(*h*) Prac. Reg. Wy. Ed. 35.
& 3 Madd. 278.

now it is settled by the highest Authority, that of the House of Lords itself, that an Appeal to the House of Lords does not stay Execution of a Decree, and that any special Application would be more to the House than to the Court below, which might become the Subject of Appeal (*a*). Where a Bill was dismissed with Costs, and appealed from *generally*, a Subpœna for the Costs was allowed to issue, pending the Appeal (*b*): and in a Suit for specific Performance, and the Decree appealed from, the Execution of the Conveyance has been suspended, but the Settlement of the Terms of it have been proceeded upon (*c*); and in a Foreclosure Cause, the Execution of the Decree has been suspended, pending an Appeal, upon paying the Interest and Costs, and consenting to a Receiver (*d*). And so upon giving Security for Money reported due (*e*). And in a recent instance, upon a Motion to stay Proceedings under a Decree pending a Petition for re-hearing, Lord Eldon in refusing the Application, observed, that the Court always gave itself Credit for being in the Right in what it ordered. That therefore the Proceedings which it ordered must go on (*f*). An Inrolment of a Decree has been vacated, upon Surprise, or special Matter (*g*), but refused, if the Merits have been entered into (*h*).

Creditors, not Parties coming in and proving, may appeal or re-hear, and so any Person interested (*i*). A *Pauper* may *eo nomine* appeal (*k*). The standing Orders restricting an Appeal to a Fortnight from a Decree in Court, and a Month from a Decree at the Rolls, has been decided not to prevail against a continued Practice contrary to it (*l*).

(*a*) 9 Ves. 316. 15 Ves. 183. 16 Ves. 83. 208. (*g*) 1 Ves. 205. 326. 1 Turn. Rep. 178.

(*b*) 3 Madd. 278.

(*h*) 16 Ves. 115.

(*c*) 14 Ves. 585.

(*i*) 1 Sch. and Lefr. 409.

(*d*) 17 Ves. 380.

(*k*) 2 Ja. and Wa. 402.

(*e*) Ibid.

(*l*) 1 Meri. 36. 19 Ves. 550.

(*f*) Gordon v. Gordon. Trin.

Ord. Canc. Bea. 234.

Vacation, 1822. MSS.

COSTS
ON DISCHARGING
AN ORDER FOR IRREGULARITY.

IN CHANCERY.

John Radcliffe,

PLAINTIFF,

AND

John Farnaby,

DEFENDANT.

*The Plaintiff's Bill of Costs pursuant to the
Order of the 19th Feb. 1823, for discharg-
ing the Defendant's Order with Costs.*

HILARY TERM, 1822.

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
THE Defendant having obtained an Order for an unusual Length of Time to answer, Drawing Notice of Motion to discharge same for Irregularity, Copy, and Service	0	2	0			
Attending at the Register Office searching for the Defendant's Or- der, and bespeaking Office Copy of same	0	13	4	0	6	8
Paid for Office Copy Order	0	5	6			
Drawing and engrossing Affidavit of Facts to support Motion to dis- charge the Order, fol. 8, Duty, and Qath	0	14	3			

COSTS ON DISCHARGING, &c.

745

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Attending reading over same before sworn, and attending at the Public Office to be sworn - - -	0	6	8			
Paid filing same, and for Office Copy	0	12	8			
Drawing and fair Copy, Brief for Counsel - - -	0	6	8	0	1	8
Copies of Notice, and of the Order to annex - - -	0	2	0	0	1	0
Gave Fee to Mr. Maddock, to move, and Clerk - - -	2	4	6	0	2	6
Attending him therewith, and several Times thereon -	0	6	8			
Attending the Court the last Day of Term, when the Lord Chancellor directed an Inquiry to be made into the Practice of the Court, and to search for Precedents	0	13	4			
Attending at the Register Office, and at the Six Clerks' Office, and inquiring of many Solicitors into the Practice - - -	0	6	8	0	6	8
Gave further Fee to Mr. Maddock to mention the Matter, and move again - - -	1	1	0			
Attending Court, first Seal after Term on Motion, and the Defendant's Order was discharged with Costs - - -	0	13	4			
Paid for Order, Entry, Copy, and Service - - -	0	10	0	0	1	0
Copy Order for the Master	0	2	6	0	1	6
Drawing Bill of Costs, and Copy for the Master, fol. 5 -	0	3	4			
Warrant on leaving same, Copy, and Service - - -	0	4	6			

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Warrant to tax, Copy, and Service	0	4	6			
Attending taxing, Clerk in Court, and Solicitor - -	0	13	4			
Paid for Master's Report, Stamp, and transcribing -	1	0	6			
Gave Master's Clerk -	0	2	6	0	2	6
Paid filing - -	0	5	10			
Attending Master for Certificate, and attending filing same	0	6	8			
Letters and Messengers (a) -	0	5	0	0	5	0

(a) No Term Fee is allowed in Proceedings of this Nature, where there is a general Bill of Costs in the Cause, and where the Proceeding forms no Part of the Proceedings in the Cause generally.

COSTS
ON DISCHARGING
AN ORDER FOR IRREGULARITY.

IN CHANCERY.

BETWEEN *William Willshire,*

PLAINTIFF,

AND

John Dermer, and others,

DEFENDANTS.

MICHAELMAS TERM, 1822.

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
THE Defendants' Solicitor having served an Order, that an Exception taken to Mr. Stratford's Report in this Cause should be argued before his Lordship, next after those already appointed, attending to search when Exceptions filed	0	6	8	0	6	8
The Defendant being irregular in his Proceedings, drawing Notice of Motion to discharge such Order, Copy, and Service	0	5	0	0	3	0
Attending taking Instructions for Affidavit (a)	0	6	8	0	6	8
Drawing and ingrossing Affidavit in Support of Motion, fol. 10, Duty, and Oath	0	16	11			
Attending to swear Affidavit, and file same	0	6	8			
Paid filing, and for Office Copy	0	14	4			

(a) The Affidavit of a Solicitor as to a Proceeding in a Cause, is never allowed as a special Affidavit, within the Meaning of Lord Erskine's Orders.

Paid for Office Copy of Defendants'					
Order to be discharged	-	0	4	6	
Drawing and fair Copy, Brief to					
Counsel, Copy, Order, and No-					
tice to annex	- - -	0	10	0	0 5 0
Gave Fee to Mr. Roupell, and Clerk					
with Brief	- -	1	3	6	0 2 6
Attending him therewith	-	0	6	8	
Attending Court, the Defendant's					
Order discharged with Costs		0	13	4	
Paid for Order	- -	0	18	0	
Attending passing same	-	0	6	8	
Paid entering Order	-	0	3	6	
Term Fee, Clerk in Court, and So-					
licitor (a)	- -	0	16	8	0 16 8
Letters and Messengers	-	0	5	0	0 5 0

HILARY TERM, 1822.

Copy of Order for the Master		0	2	6	0 2 6
Drawing Bill of Costs, and Copy,					
fol. 6	- -	0	4	0	
Warrant on leaving, two Copies,					
and Services	- -	0	7	0	0 1 0
Warrant to tax, two Copies, and					
Services	- - -	0	7	0	0 1 0
Attending taxing, Clerk in Court,					
and Solicitor	- -	0	13	4	
Paid Master for Certificate	-	1	0	6	
Gave Clerk	- -	0	2	6	0 2 6
Attending the Master for Report,					
and to file same	-	0	6	8	
Paid filing Report	-	0	5	10	
Subpoena for Costs	-	0	8	0	
Personal Service upon the Defendant					
Dermer, in the Country	-	0	10	0	
Affidavit of Service, Duty, and Oath		0	6	7	

(a) See Observations in preceding Bills of Costs.

AN ORDER FOR IRREGULARITY. 749

Paid filing, and for Office Copy	0	5	7	
Paid for Attachment	0	12	2	
Paid for Warrant thereon	0	2	6	
Paid Sheriff for Caption and Return	0	10	6	
Attending for that Purpose	0	6	8	
Instructions to Counsel to move for a Messenger upon a Capi Corpus returned	0	2	6	
Gave Mr. Roupell to move	0	10	6	
Attending him and Court	0	6	8	
Paid for Order and Entry	0	8	0	
Paid the Messenger's Bill for taking Defendant (a)	10	3	7	
Bill of Costs and Copy, fol. 12	0	8	0	
Warrant on leaving same, Copy, and Service	0	4	6	
Attending Defendants' Warrant, taxing, Clerk in Court, and Soli- citor	0	13	4	
Term Fee, Clerk, and Solicitor (b)	0	16	8	0 16 8
Letters and Messengers	0	5	0	0 5 0

(a) The Bill of Costs of the Messenger attending the Great Seal.
£. s. d.

Paid for a double Half-crown Stamp to engross the Warrant on, and Paper	0	5	3
Engrossing same	0	3	4
Paid the Lord Chancellor's Secretary for the Warrant	0	15	0
Attending him several Times with and for same	0	6	8
Attending Mr. Willshire, Plaintiff's Solicitor, taking Instructions where Defendant Dermer was to be found	0	6	8
Searching after Defendant	0	6	8
Caption Fee	1	13	4
Custody Fees fourteen Days	4	13	4
Return of the Warrant	1	13	4
	10	3	7

(b) See preceding Bill of Costs as to the Term Fee and Mes-
sengers, and the Observations made in that respect.

BILL OF COSTS

FOR

A CREDITOR,

*Upon a Charge brought in before the Master pursuant to an
Advertisement for Creditors under a Decree.*

IN CHANCERY.

BETWEEN *John Burford, Esq.*

PLAINTIFF;

AND

*George Richards, Esq. and Richard Arnold, Esq. Execu-
tors of George Butler, Esq. deceased, and others.*

DEFENDANTS.

*The Bill of Costs of Rose Beckford, Esq. a Bond Creditor
of the said Testator.*

MICHAELMAS TERM, 1822.

CHARGE.			TAX OFF.		
£	s.	d.	£	s.	d.

ATTENDING Mr. Beckford, enquiring
into the Nature of his Demand,
perusing the Bond from Mr. But-
ler, the Testator, and taking In-
structions to prepare Charge as a
Bond Creditor of Mr. George
Butler, the Testator in the Plead-
ings named, in pursuance of an
Advertisement for Creditors in the

Gazette	-	-	-	0	6	8
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Drawing, and fair Copy Charge,
fol. 11

-	-	-	0	7	4
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Drawing, and engrossing Affidavit
in Support thereof, and of the due
Execution of the Bond, Duty, &c.

0	10	8
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	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Attending reading over same before sworn, and attending at the Master's Chambers to be sworn	0	13	4	0	6	8
Paid swearing same, two Oaths, and Exhibit	0	4	6			
Warrant on leaving Charge and Affidavit, three Copies, and Services	0	8	6	0	1	0
Warrant to proceed, three Copies, and Services	0	8	6	0	1	0
Attending, and proceeded	0	6	8			
Warrant to proceed, three Copies, and Services	0	8	6	0	1	0
Attending thereon, and Charge allowed	0	6	8			
Term Fee, Clerk, and Solicitor (a)	0	16	8	0	16	8
Letters and Messengers	0	5	0	0	5	0

(a) This being an ex parte Proceeding, neither Term Fee nor Letters are allowed.

The Costs of proving a Debt before the Master, under the usual Decree upon a Creditor's Bill, are not allowed. 10 Ves. 355. *Abel v. Screech*.

BILL OF COSTS

OF

A MORTGAGEE,

*Coming in under a Decree, where a separate Report is
made as to the Creditors.*

IN CHANCERY.

BETWEEN *William Robinson,*

PLAINTIFF,

AND

Henry Harrington,

DEFENDANT

*The Bill of Costs of Richard Helsam, a
Mortgagee.*

MICHAELMAS TERM, 1823.

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
DRAWING Charge of Principal and Interest due on the Mort- gage Securities, and fair Copy for the Master, fol. 4. -	0	2	8			
Warrant, 18th November, on leav- ing same, five Copies and Services	0	12	0	0	1	6
Drawing and engrossing Affidavit of the due Execution of the Deeds, Oath, &c. - - -	0	10	1			
Drawing and engrossing Affidavit of Helsam in Support of Mortgage, and of the Principal and Interest due thereon, Duty, and Oath in the Country -	0	14	8	0	2	0

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Paid for Copy Plaintiff's Charge on Helsam, fol. 3. - -	0	1	6			
Letters and Messengers -	0	5	0	0	5	0

HILARY TERM, 1823.

January 28th. Attending Plaintiff's Warrant to proceed on Plaintiff's Charge - -	0	6	8			
—— 29th. Warrant to proceed on Helsam's Charge, four Copies and Services - -	0	9	0	0	9	0
Attending thereon, and proceeded	0	6	8	0	6	8
Drawing Helsam's Discharge, fol. 7.	0	4	0			
February 11th. Warrant on leaving, four Copies, and Services	0	9	0			
—— 13th. Warrant to proceed, four Copies and Services -	0	9	0			
Attending thereon, and proceeded	0	6	8			
—— 15th. Warrant to proceed, four Copies, and Services	0	9	0			
Attending thereon, and Discharge allowed -	0	6	8			
Instructions on Plaintiff's Motion for separate Report of Debts due to Creditors, and fair Copy for Counsel - -	0	10	0	0	3	4
Gave Fee to Counsel therewith	0	10	6			
Attending Court on Motion, and Order made - -	0	13	4			
Paid for Office Copy further Charge on Helsam, fol. 3 - -	0	1	6			
Attending Warrant thereon	0	6	8			
Drawing Additions to Helsam's Dis- charge, fol. 2 - -	0	1	4			

	CHARGE.			T	AX	
	£	s.	d.	£	s.	d.
Warrant on leaving, four Copies, and Services - -	0	9	0			
Attending thereon, and same allowed	0	6	8			
Letters and Messengers -	0	5	0	0	5	0

EASTER TERM, 1823.

Paid for Copy Draft of Master's Report as to Helsam, Plumley, and Newich, fol. 150 (a).	3	15	0	2	16	3
Copy thereof sent into the Country	1	5	0	0	18	9
Attending three Warrants to settle the Draft of the Report -	1	0	0	0	6	8
The like one Warrant -	0	6	8			
Letters and Messengers -	0	5	0	0	5	0

TRINITY TERM, 1823.

Drawing this Bill of Costs, and Copy for the Master, fol. 8 -	0	5	4			
Warrant on leaving, four Copies, and Services - -	0	9	0			
Warrant to tax the same, four Copies, and Services -	0	9	0			
Attending taxing this Bill -	0	13	4			
Attending the Register for a Certi- ficate, and the Accountant-Gene- ral, and directing a Sale of the S. S. Annuities - -	0	6	8			
Paid filing his Certificates of selling Annuities - -	0	8	8			
Paid filing his Draft on the Bank for the Costs - -	0	7	4			

(a) The Master allowed only so much as related to these three Creditors.

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
The like for the Principal and Interest due - -	0	7	4			
Attending at the Bank to receive the same - -	0	6	8	0	6	8
Paid for the Report, transcribing, &c.	3	1	0			
Gave Master's Clerk -	2	2	0			
Attending the Master for Report, and attending filing same -	0	6	8			
Filing same - -	3	14	10			
Letters and Messengers -	0	5	0	0	5	0
Letter of Attorney from Helsam to receive his Debts, engrossing, Duty, and attending the Execution	1	12	4	1	12	4
Drawing and engrossing Affidavit of the due Execution thereof, Duty, and Oath, in the Country -	0	10	8	0	10	8
Paid for Report of Costs -	1	5	0	1	5	0
Paid filing - -	0	5	10	0	5	10
Gave Master's Clerk - -	0	10	6	0	10	6
Letters and Messengers -	0	5	0	0	5	0

PRACTICAL REMARKS

AND

OBSERVATIONS

ON THE FOREGOING

Bills of Costs.

THE Court of Chancery in a Suit instituted for the Purpose of administering Assets and settling Executors' Accounts, directs the Creditors and Legatees to be called upon by Advertisements in the Gazette, and other public Newspapers, to come in before one of the Masters to whom the Cause is referred, and prove their Debts and claim their Legacies, by a Time limited in the peremptory Advertisement, under the Penalty of being excluded the Benefit of the Decree; but upon Payment of Costs of the Application, Creditors are let in at any Time, while the Fund is in Court, though the Time has elapsed (a), and even after the Money has been apportioned (b). If a Creditor applies to come in, and prove his Debt after the Report is made, the usual Order is to inquire whether the Party hath any and what Claim or Demand, on the Testator's Estate; but such Application is always upon Payment of Costs and Expences incidental thereto by the Party making it (c).

A Creditor, and also a Legatee, would find it more convenient to make his Application to the Solicitors employed by the Plaintiff or Defendant, or by the other Creditors and Legatees in the Cause, who may be easily known by Inquiry at the Master's Office, to whom the Cause stands referred, and the Advertisement leads, particularly so in respect to Costs, for it is now settled that the Creditor must

(a) 11 Ves. 602.

(c) Vol. 2.

(b) 1 Madd. Rep. 529.

prove his Debt at his own Expence, no Costs being allowed for proving a Debt before the Master under the usual Decree upon a Creditor's Bill (a). If the Creditor rather chooses to employ his own Solicitor, a Charge must be prepared stating the Nature of the Debt, and what Securities have been given, and the Sum actually and *bonâ fide* due. Where a Bond has been assigned, the Assignee may bring in a Charge of Debt in the Name of the Obligee in the Bond; the Course of Practice is not to receive a Charge of Debt from a Creditor in the Character of Assignee, unless an Order be obtained for that Purpose. The following may convey some Instruction as to the Form and Substance of the Charge:

“ That the said George Butler, deceased, was in his Life-time and at the Time of his Death, justly and truly indebted unto the said Rose Beckford, in the Sum of 400*l.* for Money lent and advanced to the said George Butler; for securing the Re-payment thereof, with Interest, the said George Butler made and executed a Bond, bearing Date the 24th Day of May 1819, in the penal Sum of 800*l.* conditioned for Payment to the said Rose Beckford, of the Sum of 400*l.* with lawful Interest, on the 24th Day of December then next ensuing: and the said Rose Beckford further Charges that the whole of the said principal Sum of 400*l.* together with Interest, from the Date of the said Bond, is now due and owing unto him from the Estate and Effects of the said George Butler.”

An Affidavit in Support of the Charge is necessary, which must verify the Substance of the Charge, and that the Creditor has the Bond, and no other Security for Payment; and in most Cases, an Affidavit of the due Execution of the Bond or other Instrument, is required from One of the subscribing Witnesses; the Affidavit should be

(a) 10 Ves. 335.

sworn at the Master's Chambers, before whom the Charge is brought in; and a Warrant must be taken out upon leaving the Charge and Affidavit, and Copies served as before directed, upon the Clerks in Court for all the Parties interested in the Fund; the Master's Clerk will inform the Solicitor of the Names of the Clerks in Court, and another Warrant must be taken out to proceed upon the Charge after the former Warrant is returnable, and served in like Manner; the Bond must be produced when the Warrant is attended, and upon hearing the Bond and Affidavit read, the Master will allow the Charge, and Care should be taken that the Master marks his Allowance of the Charge at the Time of the Attendance. If the Master should require the Bond to be left with him, it will be advisable to have an attested Copy to obviate any Inconvenience, should the Bond be lost or mislaid; sometimes the Affidavit of the Creditor is not sufficient Evidence of itself to support the Charge, in such Case the Affidavit of other Persons, in Support of the Charge, must be produced, and in some Cases Evidence *aliunde*, or an Action at Law, or an Issue is directed

The first Warrant may be underwritten, "Mr. Rose Beckford, a Bond Creditor, has left his Charge of Debt."

The second Warrant, "To proceed on the Charge of Mr. Rose Beckford, a Creditor."

If the second Warrant should not be attended, another Warrant must be taken out, which must be underwritten, "Peremptorily to proceed on the Charge of Mr. Rose Beckford, a Creditor."

And upon Oath of the regular Service of Three Warrants, the Master will proceed *ex Parte*, if none of the other Solicitors attend.

The Solicitor after the Charge is allowed, should call at the Master's Office, and examine the Draft of the Master's Report, to see that the Charge is included in the Schedules, but he must not take a Copy of the Report; his Client being no Party to the Suit, he cannot be allowed it in Costs.

The Claims of Legatees are brought in and prosecuted before the Master and supported by Affidavit, and the Proceedings are *mutatis mutandis*, the same as upon Charges of Creditors; the formulary Shape in which these Claims and Charges are made, may be seen in the following Pages under their respective Heads in another part of this Work.

The Costs of Creditors proving Debts, and of Legatees claiming Legacies, under a Decree, are not allowed; the Decree makes no Provision for Costs, unless they come in and contribute to the Expences of the Suit; although in some Instances, the Proof of Debt is attended with considerable Expence in procuring Affidavits, and in very strong contested Cases in the Examination of Witnesses, the Decree usually directs “that the Creditors and the Legatees, not Parties to the Suit, who come in before the Master, are, before they are admitted to claim such Debts and Legacies, to contribute to the Plaintiff their Proportion of the Expences of the Suit to be settled by the Master;” but this is very rarely attended to (a).

Where a Bill was filed by an Infant for a Legacy, the Costs were given out of the Estate, which the Residuary Legatee complained of; and his Honour observed that Costs would not be given in future upon a Bill to secure a Legacy due to an Infant, for that under the Legacy Act, 36 Geo. 3. c. 52. s. 32. the Executor may pay the Legacy into Court, and when the Legatee comes of Age he may apply (b).

And it is now the general Practice to restrain Creditors and Legatees from proceeding at Law, or in Equity, after a Decree; where a Creditor has come in under a Decree, and proved his Debt before the Master, he will be allowed the Costs at Law until Notice of the Decree, but not if he proceeds afterwards, and is restrained by Injunction (c).

(a) 10 Ves. 355.

(b) 4 Ves. 630.

(c) 8 Ves. 526 3 Bro. C. C.
23.

BILL OF COSTS

FOR

A PLAINTIFF,

*Resident out of the Jurisdiction upon giving Security for
the Costs of Suit.*

IN CHANCERY.

BETWEEN *John Burford*

AND

William Hale.

MICHAELMAS TERM, 1823.

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
TAKING Instructions for Bill	0	13	4			
Warrant to Prosecute, and Stamp	0	7	6			
Drawing Bill, fol. 60, fair Copy for Counsel (a) - - -	3	0	0			
Fee to Mr. Maddock, to settle and sign, and Clerk - - -	2	4	6	0	2	6
Attending him - - -	0	6	8			
Engrossing Bill - - -	1	10	0			
Paid for Parchment and Duty	0	10	8			
Paid filing same - - -	0	7	4			
Drawing Præcipe for Subpœna and attending to leave same, &c.	0	6	8			
Paid for Subpœna - - -	0	8	6			
Service thereof on Two Defendants	0	7	6			
Term Fee, Clerk in Court, and So- licitor - - - - -	0	16	8			
Letters and Messengers -	0	5	0			

(a) See preceding Observations as to Copies.

BILL OF COSTS FOR A PLAINTIFF. 761

HILARY TERM, 1824.

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
The Defendant, Hale, having obtained an Order that the Plaintiff residing out of the Jurisdiction of the Court might give Security for Costs, attending Mr. A. thereon, when he proposed himself and Mr. B. to give the Security -						
B. to give the Security -	0	6	8	0	6	8
Drawing Bond, and fair Copy	0	6	8	0	6	8
Engrossing same, and Duty	1	8	4	1	8	4
Attending the Execution thereof, and afterwards on the Six Clerks therewith - -	0	13	4	0	13	4
Paid for Office Copy Answer, fol. 28	1	12	8			
Making close Copy thereof (a)	0	9	4	0	9	4
Term Fee, Clerk and Solicitor	0	16	8			
Letters and Messengers -	0	5	0			

(a) Close Copies are allowed in a Country Cause, not in Town.

PRACTICAL OBSERVATIONS

AND

REMARKS.

IF on the Face of the Bill, a sole Plaintiff (*a*) states himself as residing abroad, out of the Jurisdiction of the Court (*b*), or if it be shewn that the Plaintiff is settled abroad: the mere simple Fact of the Plaintiff having gone abroad is not sufficient (*c*), for the Plaintiff is not compellable to give Security for Costs, unless he states himself, or that it can be proved that he is either resident or going to reside abroad (*d*); or if the Fact can be proved by Evidence *aliunde*, the Plaintiff may be compelled to give Security for the Costs of Suit, and the Proceedings may be stayed till the Security be given (*e*). A Plaintiff under an Order by the Secretary of State, under the Alien Act, to be removed out of the Kingdom, has been ordered to give Security for Costs of Suit (*f*); so an Ambassador's Servant has been ordered to give the like Security (*g*), and a Defendant who has destroyed the subject Matter of the Suit and withdrawn himself from the Jurisdiction, has been ordered to give Security for Costs, or the Plaintiff to be at Liberty to dismiss his own Bill without Costs (*h*); but it is incumbent on the Defendant in the first Instance to make this Application; if after having entered for an Appearance, the Defendant with a Knowledge of Plaintiff's Residence abroad, puts in an Answer though it be insufficient, or filed through Mistake, the Application for Costs will come

(*a*) 6 Ves. 612. 2 Bro. C. C.
609.

(*b*) 2 Ves. 24 10 Ves. 287.
Dick. 147.

(*c*) 5 Ves. 699. 3 Bro. C. C.
371.

(*d*) 2 Cox. 285.

(*e*) 10 Ves. 287.

(*f*) 5 Ves. 261.

(*g*) 2 P. Wms. 452.

(*h*) 2 Bro. C. C. 186.

too late (*a*); so if the Defendant applies for Time to answer (*b*), but not where the Plaintiff goes away to settle abroad, after the Defendant's Answer has been filed (*c*); or if the Plaintiff's Residence be not discovered till after Publication (*d*) has passed in the Cause. If an Action under the Direction of the Court of Chancery is brought in a Court of Law, Security for the Costs must be applied for in the former Court (*e*). Cases forming an Exception to this Rule are those of Land or Sea Officers, or Consuls residing out of the Jurisdiction (*f*).

When the Bill states the Plaintiff to be resident out of the Jurisdiction, the Court will upon Motion, grant the Order as of Course; but when the Fact cannot be thus collected, an Application must be supported by Affidavit, setting forth that the Plaintiff resides out of the Jurisdiction of the Court, and mentioning the Place of such Residence; upon which the Court will stay the Proceedings, and order the Plaintiff to give the usual Security for Costs, and the Defendant will not be obliged to put in his Answer until this Order has been complied with. After the Security is given, the Defendant may obtain the same Time for putting in his Answer as he was entitled to previous to the Application. The Manner of giving the Security is by the Plaintiff's Solicitor delivering a Note to the Defendant's Clerk in Court, containing the Name and Description of the Person intended to become Security. This Note is sent to the Defendant's Solicitor, who will return an Answer whether he approves the Security or not; if he does not object thereto, the Bond is consequently given. If he requires two Persons to enter into the Bond, the Plaintiff must comply with this Requisition. If the Defendant's Solicitor objects to the Persons offered as Security, the

(*a*) 1 Madd. Rep. 187. 15
Ves. 2. 2 Bro. C. C. 609.

(*b*) 10 Ves. 187.

(*c*) 14 Ves. 518.

(*d*) 2 Bro. C. C. 609. 15
Ves. 2.

(*e*) 5 Madd. 87.

(*f*) Dick. 154. 3 Moore, 77

Plaintiff must find others, or the Persons already offered must justify by Affidavit in 80*l.* before a Master.

The Bond is given to the two Senior Six Clerks, not towards the Cause, and is prepared by the Plaintiff's Solicitor in the following Form :

“ Know all Men by these Presents, that we William Willshire, of Hitchin, in the County of Hertford, Attorney at Law, and George Onslow, of the City of London, Merchant, are held and firmly bound to William Luther Sewel and John Kepling, Esquires, in the penal Sum of 40*l.* of good and lawful English Money, current in Great Britain, for which Payment to be well and faithfully made, we bind ourselves, and each of us, our and each of our Heirs, Executors, and Administrators, firmly by these Presents, sealed with our Seals, &c.”

“ Whereas L. R., Plaintiff, has lately exhibited his Bill of Complaint in his Majesty's High Court of Chancery, against R. S., Defendant, touching the Matters therein contained. Now the Condition of this Obligation is such, that if the above bounden W. W. and G. O., or either of them, their or either of their Heirs, Executors, or Administrators, do and shall well and truly pay, or cause to be paid, all such Costs as the said Court shall think fit to award to the Defendant on the Hearing of the said Cause or otherwise, then this Obligation to be void, or else to remain in full Force and Virtue.

“ Sealed and delivered, &c.”

If there are several Defendants, and one only obtains the Order, yet the Security must be general to answer the Costs of all in one Sum of 40*l.*

Recently upon this Question coming before the Court, the Vice Chancellor observed, that although it is usual to give separate Bonds to each Defendant who appears by a separate Clerk in Court, they all Form but one Security

for one Sum of 40*l.*; that originally, when there were several Defendants, only one Bond for 40*l.* was given, which was deposited with one of the Six Clerks, on behalf of all Parties; afterwards the Bond was deposited, not with a Six Clerk, but with a Clerk in Court; and as the Clerk in Court for one Party had no more Right to hold the Bond, than the Clerk in Court of another Party, it became the Practice for every Clerk in Court for a Defendant, to call for a separate Bond, but that it was desirable that the old Practice should be restored: to which his Honour expressed his Intention of calling the Lord Chancellor's Attention, and it is probable the old Practice will be restored (*a*).

By a late Decision, if the Plaintiff has Property in England, the Court will not require him to give Security for Costs, because he resides abroad, and only comes occasionally to England (*b*).

(*a*) 4 Madd. 465.

(*b*) Croft v. King, 21 Nov. 1823. MSS.

BILL OF COSTS

FOR

A PLAINTIFF,

Upon filing Exceptions to an Answer, and to the Master's Report.

EASTER TERM, 1824.

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Perusing Bill and Answer, and taking Instructions to draw Exceptions to Defendant's Answer	0	13	4			
Drawing same, and fair Copy, fol. 25.	1	5	0			
Fee to Mr. Maddock and Clerk, therewith - -	1	3	6	1	3	6
Attending him -	0	6	8	0	6	8
Engrossing Exceptions -	0	8	4	0	8	4
The Defendant's Clerk in Court refusing to receive the Exceptions, Instructions for Counsel to move for Leave to file the same, <i>nunc pro tunc</i> -	0	2	6	0	2	6
Fee to him therewith -	0	10	6	0	10	6
Attending him and Register, to draw up and enter Order -	0	6	8	0	6	8
Paid for Order, Copy, and Service	0	10	6	0	10	6
Term Fee, Clerk, and Solicitor	0	16	8			
Letters and Messengers -	0	5	0			

TRINITY TERM, 1824.

Paid for Office-Copy further Answer, fol. 16. -	0	18	8
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BILL OF COSTS FOR A PLAINTIFF. 767

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Making close Copy thereof (a)	0	5	4	0	5	4
Perusing and considering the same, when the Answer appeared defec- tive in many Particulars	0	6	8	0	6	8
Instructions for Counsel to move to refer the Exceptions -	0	2	6	0	2	6
Fee to him therewith -	0	10	6	0	10	6
Attending him and Register, to draw up and enter Order -	0	6	8	0	6	8
Paid for Order, Copy, and Service	0	10	6	0	10	6
Making close Copy of the Bill and Answer, for the Master, fol. 60.						
28, 16=104 (b) (not allowed in Costs) - -	1	14	8	1	14	8
The like of Exceptions, fol. 25 (not allowed) - -	0	8	4	0	8	4
Warrant to proceed on Exceptions, Copy, and Service - .	0	4	6			
Another Warrant to proceed thereon, Copy, and Service -	0	4	6			
Attending thereon, when it being the Desire of both Parties to argue the Exceptions by Counsel, the Master appointed a Time for that Purpose - -	0	6	8	0	6	8
Another Warrant thereon, Copy, and Service - -	0	4	6	0	4	6
Making Copy of the Answers, and Exceptions for Counsel, fol. 28, 16, 25=69 -	1	3	0	1	3	0
Fee to Mr. Maddock to argue the same - -	3	3	0	3	3	0

(a) Allowed in a Country Cause only.

(b) This is never allowed if objected to.

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Attending him - - -	0	6	8	0	6	8
Attending Warrant, and proceeded	0	6	8	0	6	8
Another Warrant, Copy, and Service	0	4	6	0	4	6
Fee to Mr. Maddock to attend thereon	1	1	0	1	1	0
Attending thereon, when the Master went through all the Exceptions, and allowed several of them	0	6	8	0	6	8
Paid for Report and Clerk -	2	2	0	2	2	0
Attending the Master for Report, and attending filing same -	0	6	8			
Paid filing, and for Office-Copy	0	5	10	0	5	10
Paid for a Subpoena for a better Answer -	0	8	0			
Service thereof on the Clerk in Court	0	2	6			
The Defendant having filed Exceptions to the Master's Report, paid for an Office-Copy thereof	0	10	4	0	10	4
Abbreviating Bill, and Answer for Counsel on arguing Exceptions, fol. 104 - - -	1	14	8			
Making two fair Copies thereof for Counsel, eight Sheets each	2	13	4	2	13	4
Fee to Mr. Solicitor General, and Clerk, with Brief -	3	5	6	3	5	6
Attending him -	0	6	8	0	6	8
Making Copy of the Exceptions for him - - -	0	8	4	0	8	4
The like of the Exceptions to the Master's Report -	0	2	8	0	2	8
Fee to Mr. Maddock, with Brief	2	2	0	2	2	0
Attending him -	0	6	8	0	6	8
Making Copy of the Exceptions to the Master's Report, for him	0	2	8	0	2	8
June 16th. Attending Court Exceptions in the Paper, but not called on	0	10	0	0	10	0

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
June 23d. The like when the Mat- ter was heard, and the Excep- tions taken to the Master's Re- port over-ruled, and Deposit or- dered to be paid to the Plaintiff, but no Costs, Clerk and Solicitor	1	0	0	1	0	0
Paid Court Fees -	0	10	6	0	10	6
Paid for Order, Copy, and Service	0	11	0	0	11	0
Attending at the Register Office to receive the Deposit, and giving a Receipt for the same -	0	6	8	0	6	8
Paid Poundage -	0	5	0			
Paid for Office-Copy further Answer, fol. 18 -	1	1	0			
Making close Copy thereof (a)	0	6	0	0	6	0
Fee to Mr. Maddock to peruse the Pleadings, and advise thereon	2	2	0	2	2	0
Replication and Duty -	0	12	8			
Term Fee, Clerk, and Solicitor	0	16	8			
Letters and Messengers -	0	5	0			

(d) Close Copies are allowed in Country Causes, not in Town.

BILL OF COSTS

FOR THE

DEFENDANTS.

IN CHANCERY.

BETWEEN *James Elliott, Esq.*, PLAINTIFF,
AND
Dame Elizabeth Jane Booth, and others,
DEFENDANTS.

*The Bill of Costs of the Defendants, upon over-ruling the
Exceptions filed by the Defendant, Edward Aylett, Esq.
beyond their Moiety of the Deposit made by him with the
Register, pursuant to an Order of 31st of July, 1822.*

HILARY TERM, 1823.

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Paid for Copy of Defendant Aylett's Objections to Draft, Report re- specting Interest remaining due	0	3	0			
January 26th. Warrant to proceed thereon, Copy, and Service	0	6	6			
Attending thereon (no one for De- fendant Aylett) -	0	6	8			
— 29th. Warrant to proceed, Copies and Service -	0	6	0			
Attending thereon, Defendant Ay- lett left Word he should attend next Warrant with Counsel	0	6	8			
February 1st. Warrant to proceed, Copies, and Service -	0	6	0			

BILL OF COSTS FOR DEFENDANTS. 771

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Attending thereon, when at Defendant Aylett's Request the Master directed another Warrant	0	6	8			
Jan. 5th. Warrant to proceed, Copies, and Service -	0	6	0			
Attending thereon, when the Master was obliged to go to the House of Lords, and desired another Warrant - - -	0	6	8			
8th. Warrant to proceed, Copies, and Service - -	0	6	0			
13th. Attending thereon, when the Master did not come to Chambers in Time - -	0	6	8			
Warrant to proceed, Copies, and Service - -	0	6	0			
17th. Attending thereon, when the Master was ill and could not attend - -	0	6	8			
26th Warrant to proceed, Copies, and Service -	0	6	0			
March 3d. Attending thereon when the Objections were argued by the Counsel for the Defendant Aylett and were disallowed -	0	6	8			
Paid for Copy, Additional Objections to the Draft Report	0	2	0			
9th. Attending Defendant Aylett's Warrant of 4th of March thereon, where the same was argued by Aylett's Counsel, and disallowed	0	6	8			
The Defendant Aylett having given a Notice of Motion to set aside the Order for confirming the Report Nisi, with Costs—						

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Searching several Times if he had filed any Affidavit in Support of his Motion, and paid Search	0	7	2	0	7	2
Drawing Brief to oppose Motion, two Sheets - -	0	13	4	0	13	4
Making Copy for Counsel -	0	6	8	0	6	8
Copy of Notice to annex -	0	1	0	0	1	0
Fee to Mr. Sugden -	1	1	0	1	1	0
Attending him - -	0	6	8	0	6	8
Attending Court all the Morning when the Motion was not made by any Counsel for Aylett -	0	13	4	0	13	4
Term Fee, Letters and Messengers	1	1	8			

EASTER TERM, 1823.

Term Fee and Messengers, Excep- tions set down in the Register's Book - -	1	1	8
Paid for Office Copy thereof	0	11	6

TRINITY TERM, 1824.

Perusing and considering the several Orders in the Cause, and the last Report and Exception thereto, and taking Instructions to draw Brief for Counsel to argue the Exceptions - -	0	6	8	0	6	8
Drawing Brief, eleven Sheets	3	13	4	1	0	0
Making two fair Copies for Counsel	3	13	4	3	13	4
Attending the Lord Chancellor's Seal Bearer, to know if the De- fendant Aylett had left Copies of the Report and Exceptions, and found he had not -	0	6	8	0	6	8

FOR DEFENDANTS.

773

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Making Copy of Order, thirty-six Sides - -	0	18	0	0	6	0
Ditto of Report, thirty-one Sides	0	15	6	0	7	9
Ditto of Exceptions -	0	5	0	0	3	0
Revising the same, and copying in red Ink, for the Lord Chancellor, the Difference between the Exceptions, and the Objections carried before the Master -	0	6	8	0	6	8
Paid Fee on leaving Papers -	0	5	0			
Attending to leave same -	0	6	8			
Making a Copy of the Exceptions and Objections, so marked for Counsel - -	0	5	0	0	5	0
Fee to Mr. Mansfield with Brief to argue Exceptions, and Clerk	5	7	6			
Attending him - -	0	6	8			
Fee to Mr. Lloyd and Clerk	4	6	6			
Attending him -	0	6	8	0	6	8
July 30th. Attending Court the Exceptions coming on, no Counsel appearing for Defendant Aylett, they were over-ruled with Costs beyond the Deposit, and ordered to be divided between the Parties, appearing by Counsel on the Exceptions, provided Affidavits were filed of the Service of the Order for setting down the same	0	13	4			
Paid Court Fees - -	0	13	0			
Attending searching if the Order for setting down the Exceptions had been duly passed, and paid Search - -	0	7	2	0	6	8
Drawing and engrossing a special						

	CHARGE.			TAX OFF		
	£	s.	d.	£	s.	d.
Affidavit as to the Service of the Order on the Solicitor for Defen- dants, Lady Booth and others, and paid Oath - - -	0	8	1	0	1	0
Attending to swear and file the same	0	6	8			
Paid filing - - -	0	6	1			
Paid for Order overruling Excep- tions - - -	6	14	6			
Attending passing - - -	0	6	8	0	6	8
Paid entering - - -	0	4	0			
The Defendant Aylett having given a Notice of Motion for discharging the Order over- ruling the Exceptions						
Attending searching whether the Defendant had filed any Affidavit in Support of his Motion, and found he had not, and paid	0	7	2			
Drawing Brief to oppose the Motion	0	6	8			
Copy for Counsel - - -	0	2	6			
Fee to Mr. Mansfield and Clerk	1	3	6			
Attending him - - -	0	6	8			
August 14th. Attending Court all the Day when the Motion was not made - - -	0	13	4			
Term Fee, Letters and Messengers	1	1	8			

MICHAELMAS TERM, 1824.

Making Copy of ordering Part of Order for the Master -	0	2	6			
Drawing Bill of Costs and Copy, fol. 20. - - -	0	10	0			
Warrant on leaving same, Copies, and Service - - -	0	4	6			
Ditto to tax - - -	0	4	6			

FOR DEFENDANTS.

775

		CHARGE.			TAX OFF.		
		£	s.	d.	£	s.	d.
Attending taxing	- -	0	13	4			
Paid for Report of Costs	-	1	5	0			
Paid transcribing and to Clerk		0	7	6			
Attending for Report and filing		0	6	8			
Paid filing	- -	0	6	0			
Attending to bespeak and receive							
Draft for Costs	- -	0	6	8	0	6	8
Paid filing Certificate of Payment		0	3	6			
Term Fee and Messengers	-	1	1	8			

BILL OF COSTS

FOR

PLAINTIFF,

On Reference of Bill for Impertinence.

IN CHANCERY.

BETWEEN *Sir Delves Broughton,*

PLAINTIFF;

AND

Oswald Leycester,

DEFENDANT.

HILARY TERM, 1823.

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Copy Order to refer Bill for <i>Imper-</i> <i>tinence</i> - -	0	2	0			
Fair Copy, Bill for Counsel, fol. 80	1	6	8	1	6	8
Fee to Mr. Moore and Clerk, with same - -	2	4	6	2	4	6
Attending him thereon -	0	6	8	0	6	8
Warrant to proceed, Copy, and Ser- vice - -	0	4	6			
Attending Court, and Bill reported not impertinent - -	0	13	4	0	6	8
Paid for the Master's Report	1	0	6			
Attending for and to file same	0	6	8			
Paid filing and for Office Copy	0	3	10			
Term Fee, Clerk and Solicitor, Let- ters, &c. - -	1	1	8	1	1	8

EASTER TERM.

Instructions to move to refer it to
the Master to Tax the Costs of
reference of Bill - -

0 2 6

FOR A PLAINTIFF.

777

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Attending Mr. Moore thereon	0	6	8	0	6	8
Fee to him - - -	0	10	6			
Attending Court on Motion	0	13	4	0	13	4
Attending to Draw up the Order, enter, and pass same -	0	6	8			
Paid for Order - -	0	6	0			
Paid entering - -	0	0	6			
Copy and Service - -	0	3	0	0	1	0
Bill of Costs and Copy for Counsel	0	4	0			
Warrant on Hearing -	0	3	0			
Copy and Service - -	0	3	0	0	1	6
Warrant to tax - -	0	3	0			
Copy and Service - -	0	3	0	0	1	6
Attending taxing, Clerk, and Solicitor	0	13	4			
Paid for Report - -	1	0	6			
Attending for, and to File same	0	6	8			
Paid filing, and for Office Copy	0	3	10			
Conditional Subpoena for Case, at- tending, and Service -	1	4	8			
Term Fee, Clerk, and Solicitor	1	1	8	1	1	8

PRACTICAL OBSERVATIONS

AND

REMARKS,

On References for Scandal and Impertinence.

THE general Rule with regard to the Purity of the Proceedings of the Court, as expressed by Lord Eldon, is, *that there can be no one Proceeding before the Court, which if made the Vehicle of Scandal or Impertinence, the Court will not examine with a View to Reform (a)*; but it should be observed, that the Court in its anxiety to preserve the Purity of its Records, will not interfere at the Instance of a Person not a Party to the Suit (b).

By the standing Orders and general Practice of the Court, if a Bill contain *scandalous, irrelevant, or impertinent* Matter, it may be referred as of Course, and the repudiated Matter expunged (c); but the Bill may be impertinent without being scandalous, for although whatever is scandalous, is of Course impertinent, yet if it be *relevant*, although not Material, it has been held neither scandalous or impertinent (d), and the *major* or *minus* of the Relevancy is not regarded (e): and so if an Answer goes out of the Bill to state Matter not material to the Plaintiff's Case, it will be deemed *impertinent*; but if the Matter of the Answer be relevant, whatever the Nature of it may be, it is not scandalous, for nothing is held irrelevant that may have an Influence upon the Suit, according to the Nature of it (f).

An *original* or *amended Bill* may be referred for Scandal

(a) 18 Ves. 114.

(d) 2 Ves. 24. 6 Ves. 514.

(b) 4 Madd. 252.

(e) 11 Ves. 526.

(c) Ord. Canc. Bea. Ed. 25.

(f) 6 Ves. 514. 11 Ves.

167. 18 Ves. 223.

526.

or Impertinence, but after a Defendant has put in an Answer, or submitted by obtaining Time to Answer, he cannot refer the Bill for Impertinence (*a*), but he may for *Scandal* at any Stage of the Suit (*b*); a Defendant not served with Process, may appear *voluntarily* and refer the Bill for Scandal and Impertinence (*c*); but a Stranger to the Record, not being allowed to take an Office Copy of the Bill, cannot obtain an Order of Reference for Scandal (*d*); an Answer of one Defendant may be referred for Scandal, on the Application of a co-Defendant (*e*); an Answer may be referred for Impertinence after Notice of Motion to dismiss for want of Prosecution (*f*): there seems to be no general Line of Practice, restricting the Reference of an Answer for Impertinence, within any fixed Period: at the Hearing, impertinent Matter has been ordered to be expunged (*g*); but it should seem that any Step taken in respect of an Answer as of a Plea, before a Reference for Impertinence would be a Waiver of all Objection to the Answer on the Score of Impertinence: Lord Thurlow held that Exceptions, or a Replication filed to an Answer, waived a Reference for impertinence (*h*); an Undertaking to speed the Cause seems to have been so decided (*i*).

If an Answer is considered *impertinent*, and also *insufficient*, an Application should be first made to refer the Answer for *Impertinence*, and a Report upon the *Impertinence* should precede a Reference for *Insufficiency* (*k*): it having been decided, that after a Reference for *Insufficiency*, the Answer cannot be referred for *Impertinence* (*l*), nor can

(*a*) 2 P. Wms. 313. 2 Ves. 631.

(*b*) 5 Ves. 656. 1 Ves. 24. 2 Ves. 631. Dick. 173.

(*c*) 2 Bro. C. C. 279.

(*d*) 4 Madd. 252.

(*e*) 6 Ves. 514.

(*f*) 1 Bro. C. C. 400.

(*g*) 2 Eq. Ca. Abr. 68.

(*h*) 1 Cox. 412.

(*i*) *Barnes v. Saxby*, 2 Madd. Ch. 354.

(*k*) 14 Ves. 534. 2 Ves. and Bea. 293.

(*l*) 6 Ves. 458.

an Answer be referred for Insufficiency pending a Reference for *Impertinence* (a); if the Plaintiff refers the Answer for Scandal or Impertinence, and the Master finds it neither scandalous or impertinent, the Plaintiff must in his Exceptions to the Report, specify the Particulars in which he alleges the Report to be erroneous, he must shew in what Line or Page, and how far the Matter is scandalous or impertinent (b); in a recent Instance, it was held that Exceptions to a Report of *Impertinence* may be taken after an Order to expunge, until that Order is acted upon, and that it is not necessary to take Objections before the Master previous to excepting to a Report of Impertinence: where it was impossible to prepare Exceptions, so as to specify the Matter of Exception, before the Matter could be expunged by the Master, a general Exception was allowed to be taken to the Master's Report, without setting out the Particulars excepted to (c).

If an *Examination* is referred for Impertinence, and the Master finds it impertinent, he must state in his Report, in what respect he considers it to be impertinent (d).

Interrogatories and Depositions, or the latter alone, may be referred as of course, without Notice for Impertinence and Scandal (e), but not for Impertinence only (f); but the Witness will not be ordered to pay the Costs of scandalous and impertinent Depositions, which by the fault of the Commissioners were taken down (g): *Depositions* of Witnesses examined to Credit have been referred for Scandal and Impertinence (h); a *State of Facts and Affidavits* in Bankruptcy, and the *Affidavit* of a Party's own Solicitor have been referred for Impertinence (i); a *Discharge* car-

(a) 14 Ves. 535, 537. notis.

(b) 2 P. Wms. 182.

(c) 1 Meri. 135.

(d) 3 Madd. 246.

(e) 19 Ves. 113.

(f) 12 Ves. 201. 19 Ves.
113. 3 Atk. 557. Dick. 733.

(g) 2 P. Wms. 495. 2 Atk.

235.

(h) Dick. 288.

(i) 18 Ves. 114. 2 Atk.

391. Dick. 113.

ried in before the Master has been referred for Impertinence (*a*); and a Bill of Costs has been held within the Rule, but not a Petition of Appeal (*b*).

By a General Order, of the 10th of March, 1818, all Reference of Answers for Insufficiency, or for Scandal and Impertinence, or for Impertinence, made in the same Cause, must be made to the same Master; and where Answers of Defendants have been referred for Scandal and Impertinence, or for Impertinence, and the Court shall afterwards refer the same for Insufficiency, the latter Reference is to be made to the same Master, as on the former Reference (*c*).

A Reference for Scandal or Impertinence is obtained by Motion of course, or by Petition to the Master of the Rolls, for an Order of Reference to a Master to look into the Bill, Answer, or other Proceeding, and to certify to the Court whether it be scandalous and impertinent or not. The Motion, Paper, or Petition answered, must be left at the Register-Office, and the Order drawn up, passed, and entered there, and served upon the adverse Clerk in Court. The Order or a Copy must be left at the Master's Office to whom the Reference is directed, and a Warrant taken out to proceed on the Reference, and served on the adverse Clerk in Court, and the Office-Copy of the Bill or Proceeding referred must be brought by the Solicitor to the Master's Office, at the Time appointed by the Warrant: the objectionable Matter must be stated to the Master, and read to him out of the Office-Copy: sometimes Counsel attend, usually the Counsel who signed the Pleading complained of. The Master upon hearing all Parties, exercises his Judgment upon the Pleading or Proceeding referred, and certifies his Opinion thereon to the Court. The Certificate is in the Nature of a Report, of which he prepares no Draft; and as no Objections lie to the Report, it requires no Confirmation by the Court. A Party dissatisfied with the Master's Determination, may take the Opinion of the

(*a*) 2 Cox. 184.

(*b*) 1 Ja. and Wa. 327.

(*c*) 3 Madd. 317. 1 Swanst.

128.

Court by filing Exceptions to the Report, and bringing it on in that Shape to be heard. The Master's Certificate must be filed at the Report Office, and an Office-Copy taken for use: if the Master certifies the Bill or Proceedings to be scandalous or impertinent, or both, and his Certificate is not excepted to, an Application as of course must be made by Motion in Court, or by Petition to the Master of the Rolls, for an Order of Reference back to the Master, to *expunge* the repudiated Matter, and to tax the Party complaining his Costs occasioned by the Reference. The Order must be drawn up, passed and entered, at the Register Office, and served upon the opposite Clerk in Court, and Instructions given to the Party's Clerk in Court to attend with the Record of the Bill or Answer, or Proceeding complained of at the Master's Office, that the scandalous or impertinent Matter may be expunged, which is done by the Master striking his Pen through the Matter so reported, and setting his Initials against the Clauses expunged. The Record thus purified is brought back by the Clerk in Court, and replaced upon the File in the Six Clerks' Office, from whence it was taken. The Party succeeding in the Application, and to whom the Costs are given by the Order to expunge, must make out and leave with the Master a Bill of Costs, and take out and serve upon the opposite Clerk in Court a Warrant on *leaving the Bill of Costs*; and a subsequent Warrant to tax the Costs of the Reference, and if the other Side do not attend, he must proceed *ex parte* (a), for which Instructions have been before given. The Bill of Costs when taxed, must be certified by the Master, and the Certificate must be filed at the Report Office, and an Office-Copy taken from thence. For Recovery of those Costs, a Subpœna must be obtained by leaving a Præcipe, in the following Form, at the Subpœna Office in the Rolls Yard, producing the Office-Copy of the Master's Certificate to shew the Sum at which the Costs are taxed, at the same Time.

(a) Ante, 338.

Subpœna William Willshire to pay five Pounds Costs to
Daniel Tymes, Esq., or Bearer.

Tested 28th June, 1824.

John Duncombe, Solicitor.

The gross Sum allowed for taxed Costs is stated in the Body and Label of the Writ, and is always made payable to the Party or Bearer, whose Receipt will be a Discharge of the Process. The Service of the Subpœna must be *personal*, and an *actual* Demand of the Costs made at the same Time: if it cannot be served *personally*, an Order must be obtained as in the Case of an absconding Party for substituting a Service upon the Party's Clerk in Court, or at his Dwelling House or Place of Abode, for which Directions have been given. If the Party neglect or refuse to pay the Costs upon Service and actual Demand made, an Affidavit of Service of the Subpœna upon the adverse Party, or at the Place and Manner substituted by the Order, and of the Refusal to pay them, must be made and left with the Clerk in Court, previous to any Proceeding and Instructions given for making out an Attachment for non-Payment of the Costs, and issuing the usual Course of Process of Contempt to enforce obedience.

The Costs of Reference for Scandal or Impertinence abide the Event (*a*): if the Master reports the Proceeding to be scandalous or impertinent, an Order to expunge and to tax the Costs of the Reference follows as of course; but if the Master reports it not impertinent, a similar Order may be obtained to tax the Defendant's Costs, occasioned by the Reference, and for the Plaintiff to pay such Costs when taxed (*b*).

Reference of Answer for Insufficiency.

If the Plaintiff conceives an Answer to be insufficient to the Charges contained in the Bill, he may take Exceptions to the Answer, stating such Parts of the Bill as he alleges

(*a*) Ord. Can. Be. Ed. 167. (*b*) 1 Meri. 132.

Bea. Costs. 245.

are not answered, and pray that the Defendant may put in a full and further Answer to the Bill (*a*). These Exceptions are in Writing, and they comprise those particular Charges in the Bill to which the Plaintiff insists no Answer has been given. In preparing Exceptions, care should be taken that all the Points of Insufficiency are embodied in the Exceptions; for by the general Rule of Practice, a Plaintiff is not allowed to add to or alter Exceptions after they are filed (*b*): if the Defendant puts in an insufficient Answer to the Exceptions, the Answer must be referred back upon the old Exceptions (*c*); but this Rule bends to Circumstances, upon a clear Mistake accounted for, and on special Application, leave has been given to add or amend Exceptions upon Payment of Costs (*d*). Where there are two or more Defendants who put in separate and distinct Answers, separate Exceptions must be filed to each Answer (*e*); and where Exceptions were taken to the joint Answer of two Defendants, and one of them died, the Exceptions were held to refer to the Answer of the Survivor only (*f*); and a several Answer put in by one Defendant and reported insufficient, and the other Defendant putting in a similar Answer, insisting upon the same Matter; the Court *brevi Manus* decided upon the Insufficiency of the Answer, without sending it to a Master (*g*). Where a Defendant demurs or pleads to any Part of the Discovery sought by the Bill and Answer likewise, Exceptions taken to the Answer before the Demurrer or Plea is argued, would have the Effect of admitting the Demurrer or Plea (*h*); but in such Case, the Plaintiff has been allowed to withdraw the Exceptions, upon Payment of Costs, without Prejudice to filing Exceptions,

(*a*) Red. Tr. Ch. 256. Coop. Pl. 319.

(*b*) Prac. Reg. Wy. Ed. 201. 11 Ves. 575. Prax. Alm. 10.

(*c*) 11 Ves. 575.

(*d*) 10 Ves. 284. notis. 11 Ves. 580.

(*e*) Dick. 609.

(*f*) Dick. 255.

(*g*) Vern. 74.

(*h*) 3 P. Wms. 325. 4 Bro. C. C. 256. 2 Atk. 390.

if the Demurrer or Plea should be allowed (*a*); but if the Demurrer or Plea be only to the Relief, and not to any Part of the Discovery, Exceptions may be filed to the Answer before the Demurrer or Plea is argued (*b*). If a Demurrer or Plea is filed without an Answer, and is overruled, the Plaintiff need not take Exceptions, but the Defendant must answer the whole Bill as if no Answer had come in (*c*): but if the Demurrer or Plea is accompanied by an Answer to a single Fact, even to a Denial of Combination merely, and the Demurrer or Plea is over-ruled, the Plaintiff must except to the Answer as insufficient (*d*). As a general Rule of Practice, Lord Eldon has decided that if a Plaintiff excepts to an Answer, and afterwards moves to amend his Bill, it operates as a Waiver of the Exceptions; and that where the Plaintiff, after having excepted to the Answer, is desirous of amending the Bill, without Prejudice to the Exceptions previously taken, there must be a special Motion to that Effect; but an Amendment previous to taking Exceptions by merely adding, a Defendant, requiring no further Answer, his Lordship held an excepted Case, and that it did not prevent Exceptions being taken to the Answer (*e*). If after the Answer has come in the Bill is amended stating a new Case, repeating some of the Interrogatories to the original Bill; it has been held upon Exceptions, that the Defendant must answer all the Interrogatories, though some of them have been before answered (*f*); and if Exceptions have been taken, and the Bill is afterwards amended, and the Plaintiff proceeds upon the Insufficiency of the Answers to the original and amended Bill, he must proceed upon the old Exceptions as far as they apply to the original Bill and the new Exceptions, as to

(*a*) Red. Tr. Ch. 256. 3 P.

(*d*) Bunb. 123.

Wms. 325. 13 Ves. 85.

(*e*) Ambl. 70. 9 Ves. 315.

(*b*) 3 P. Wms. 327. Dick.

12 Ves. 458.

496. 602. Red. Tr. Ch. 256.

(*f*) 3 Madd. 66.

(*c*) Red. Tr. Ch. 256. Coop.

Pl. 321.

the new Matter introduced by Amendment. And the Master in considering the Sufficiency of the Amendments, may give his Judgment upon the Answer to the Amendments, with a Reference to such Parts of the original Bill as apply to them (*a*). And if an Answer is reported insufficient, and the Plaintiff obtains an Order to amend, and for Defendant to Answer the Exceptions and Amendments at the same Time, he must answer both, before he can move to dissolve an Injunction, though granted on the original Bill (*b*): where the Answer is reported insufficient in any of the Parts excepted to, the Defendant must answer again to those Points of the Bill in which the Master conceives the Answer to be insufficient, unless by excepting to the Report, he brings the Matter before the Court, and there obtains a different Judgment; but if the Defendant has insisted on any Matter as a Reason for not answering, though he does not except to the Report, he is not absolutely precluded from insisting upon the same Matter in a second Answer, and taking the Opinion of the Court whether he ought to be compelled to answer farther to that Point (*c*): the Defendant is not precluded from putting in a second Answer pending Exceptions to the Suit (*d*). After a Plaintiff has replied to a Plea or Answer, he cannot go back to except for Insufficiency, he having thereby admitted the Answer to be sufficient, however imperfect it may be (*e*).

To refer an Answer for Insufficiency, Instructions with Copies of the Bill of Answer should be laid before Counsel, usually the Counsel who drew the Bill, to prepare Exceptions to the Defendant's Answer, and as they must be signed by Counsel, it is advisable to let Counsel prepare the Draft (*f*), the Form of which will be found in another Part of this Work (*g*): the Draft settled and signed by Counsel must be

(*a*) 11 Ves. 570.

(*b*) Dick. 255.

(*c*) Red. Tr. Ch. 255. 2

Ves. 291. Coop. Pl. 328.

Coll. jun. 191.

(*d*) 1 Ves. j. 87.

(*e*) Prac. Reg. Wy. Ed.

(*f*) 6 Madd. 104.

(*g*) Vol. 2, Tit. Exceptions.

fair copied on plain Paper Draftwise, and left with the Plaintiff's Clerk in Court to file, which is done by delivering them over to the adverse Clerk in Court, writing thereon previously the Day of the Month and of the Year when delivered, which is termed *filing Exceptions*; the Course of Practice requires that all Exceptions to Answers should be filed in the same Term, or within eight Days after the End of the Term in which the Answer came in: if the Answer was filed during the Vacation, the Exceptions must be filed within the first eight Days of the next ensuing Term (a); after this Period, unless the Defendant's Clerk in Court will consent to accept them, the Plaintiff cannot file Exceptions without an Order to file them *nunc pro tunc*; this Order is obtained as of Course by Motion in Court, or more speedily by Petition to the Master of the Rolls, *See Petitions*, if made within the two next Terms and the following Vacation after the Answer was filed: if the Answer was filed in Trinity Vacation, the Plaintiff has in all Cases the next Michaelmas and Hilary Terms, and the whole of the Hilary Vacation following to obtain an Order, as of Course to file Exceptions *nunc pro tunc* (b), whether the Bill be for Relief or merely for Discovery (c); after that Period has elapsed, Application for leave to file Exceptions must be made upon Notice supported by Affidavit, accounting for the Delay, and stating the general Facts and Circumstances upon which the Application is made (d); and where an Answer has been referred and reported impertinent, the Plaintiff has two Terms and the following Vacation from the Date of the Report, within which he may move to file Exceptions to the Answer *nunc pro tunc* (e). After a Report of Insufficiency, and a Plea, and further Answer put in, and the Plea overruled, an Order has been made under Circumstances to file Exceptions to the Master's Report, *nunc pro tunc* (f).

(a) Ord. Canc. Bea. Ed. 181.

(d) 3 Atk. 19. 14 Ves. 536.

(b) 6 Ves. 823.

(e) 1 Meri. 1.

(c) 1 Madd. Rep. 526.

(f) 1 Madd. Rep. 339.

The Exceptions being filed, the Defendant is allowed eight Days from the Delivery of the Exceptions to his Clerk in Court, to consider whether he will submit to put in an Answer to the Exceptions ; if the Defendant submits to answer he must pay twenty Shillings Costs of Submission, to the Plaintiff's Clerk in Court, and he may then obtain two Orders for Time to answer the Exceptions ; in a Town Cause an Order for a Month, and another Order for a Fortnight ; in a Country Cause an Order for six Weeks, and a subsequent Order for three, but upon obtaining the second Order, he must in either Cause enter his Appearance with the Register (a), consenting that a Sergeant at Arms shall go against him, as upon a Commission of Rebellion returned ; but a Defendant submitting to answer Exceptions, is not intitled to further Time under this Order, if he has previously had three Orders for Time, and consented to a Sergeant, upon the usual Terms (b).

If the Defendant does not submit to answer the Exceptions, the Plaintiff after the Expiration of eight Days from the Day of Delivery of the Exceptions to the Defendant's Clerk in Court, must obtain by Motion of Course, or more conveniently by Petition to the Master of the Rolls, an Order of Reference to a Master to look into the Plaintiff's Bill and the Defendant's Answer, and to certify whether the Answer be sufficient in the Points excepted to or not : if the Defendant should submit in this Stage to answer the Exceptions, he would pay thirty Shillings Costs : but if the Plaintiff proceeds, the Order of Reference drawn up, passed, and entered at the Register Office, for which Instructions have been already given, must be served, by leaving a Copy of the Order passed and entered with the Defendant's Clerk in Court or his writing Clerk at his Seat in the Six Clerk's Office, shewing the original Order, at the Time of Service ; and the Order or a Copy, must be left at the Master's Office, to whom the Reference is made ; a Warrant

(a) Ord Cano. Bea. Ed. 455. (b) 8 Ves. 601.

to proceed upon the Reference is then taken out and served upon the Defendant's Clerk in Court; on Failure of Defendant's Attendance, a second, and lastly a third and peremptory Warrant is taken out and served as before, and attended by the Plaintiff's Solicitor: if the Defendant does not attend any of these Warrants, the Service of the three Warrants upon the Defendant's Clerk in Court must be verified by the Oath of the Person serving them, to authorize the Master to proceed *ex parte* upon the Reference. If the Defendant's Solicitor attends and insists upon the Sufficiency of the Answer, it may be advisable for the Plaintiff's Solicitor to attend by Counsel, to support the Exceptions, and for this Purpose it will be necessary to furnish him with a Copy of the Bill, Answer, and Exceptions (usually the Draft of the Bill prepared and signed by him) with a Fee of two Guineas for the first, and one Guinea for every subsequent Attendance, but this must always depend upon the Nature of the Cause. Upon the Attendance before the Master, the Plaintiff's Counsel briefly states the Subject of the Suit, the Matter of the Bill and Prayer, and then opens the first Exceptions taken to the Defendant's Answer; the Defendant's Counsel in supporting the Answer, states such Part of it, as he conceives to be an Answer to the Exceptions; the Master on the Discussion must give his Judgment on each Exception (a), which he does by allowing or disallowing the whole or Part of each distinct Exception as it is opened upon Argument, but the Master may look into the Materiality of the Exceptions, and overrule such as he is of Opinion are immaterial (b), and in this Manner he must dispose of the *whole* of the Exceptions referred. When all Parties have been heard and their Argument concluded, the Master reports his Judgment upon the Exceptions by a Certificate, which is prepared in his Office, and when signed by the Master, must be taken by the Solicitor and filed in the Report Office, and an Office Copy

(a) 1 Ves. & Bea. 331.

(b) Coop. 212.

taken for use. This Certificate requires no Confirmation by the Court, and as no Draft is prepared, no Objections to it can be brought in.

In Injunction Causes where Exceptions are shewn as cause against dissolving the Injunction, and the Party is put to procure the Master's Report in four Days, the Exceptions must be left as before, and Warrants taken out and made good Service for the next Day, but the Time is usually enlarged upon the Master's certifying that the Time is too short, or the Solicitors agreeing that the Report shall be dated within the four Days, and give longer Time for the Master to consider of his Opinion : if the Answer is reported insufficient, and the Defendant does not except to the Master's Report, he must put in a further Answer, and the Plaintiff's Clerk in Court then calls upon the Defendant's Clerk in Court for forty Shillings Costs in a Town Cause, and fifty Shillings Costs in a Country Cause : and by the standing Orders (a) upon a second Answer reported insufficient three Pounds Costs, and upon a third Answer so reported four Pounds, and after a third insufficient Answer the Defendant will be examined upon Interrogatories and stand committed, and pay not only four Pounds Costs, but such further Costs as the Court shall direct ; and to enforce Payment of these Costs the Plaintiff must take out a Subpœna, by leaving a Præcipe in the following Form at the Subpœna Office in the Roll's Yard, and producing the Master's Report of the Insufficiency of the Answer :

*Subpœna for Ralph Leycester to pay 40s. Costs to
George Delves or Bearer.*

Kensit, Solicitor.

Aug. 12, 1824.

These Costs are always made payable to the Bearer, and the Service of the Process must be *personal, and the Costs demanded* at the Time of Service, and if any Difficulty arises in the Service of the Process, or in obtaining Payment, the Course of Proceeding before treated of must be followed.

(a) Ord. Canc. Bea. Ed. 183. 317.

The Defendant must put in a further Answer in eight Days, which he may be compelled to do by a Subpœna to put in a better Answer, obtained as the last Process, by leaving a Præcipe in the following form at the Subpœna Office.

Subpœna for Ralph Leycester to put in a better Answer at the Suit of George Delves, returnable immediately.

Kensit, Solicitor.

12th Aug. 1824.

This Subpœna is always returnable immediately, and is served upon the Defendant's Clerk in Court; the Defendant being already in Court, no Appearance is entered, but the Defendant must Answer in eight Days (a) after Service of the Process, and if the Defendant has not come previously under Terms he is intitled of course to one Order for Time, the General Order (b) not attaching before the second Application for Time to answer an Amended Bill or after Exceptions allowed (c). And though the Defendant is in Contempt, yet where some of the Exceptions to his Answer have been allowed and some overruled, if the Plaintiff excepts to the Report as to the Exceptions overruled, and the Defendant to those which the Master has allowed; and the Court has allowed the Plaintiff's Exceptions, and disallowed those of the Defendant, the Defendant must, in such case, be served with a Subpœna to put in a better Answer (d): upon a second insufficient Answer, Exceptions may be referred immediately.

If either Party be dissatisfied with the Master's Decision, he may take the Opinion of the Court by filing Exceptions to the Master's Report, Forms of which will be found in another Part of this Work (e); and this the Defendant should do before the eight Days allowed to put in a better Answer are expired, afterwards it would be at the Risk of an Attachment; the Exceptions drawn or perused and

(a) Ord. Cano. Bea. Ed. 182. 251.

(b) 23 Jan. 1794.

(c) 17 Ves. 113.

(d) Coop. 221.

(e) Vol. 2, Tit. Exceptions.

signed by Counsel fairly transcribed on Paper or Parchment upon proper Stamp, with the Counsel's name thereto, must be filed with the senior Register, and a Deposit of five Pounds made at the same Time, and a Certificate in Writing of the Deposit being made must be obtained from the Register annexed to a Petition, *see Petitions*, and for an Order to set down the Exceptions, which must be presented to the Lord Chancellor, and left with his Secretary, Mr. Farrer, in Lincoln's Inn Fields, a Fee of 10s. is paid to his Lordship's Secretary when the Petition is answered; the Petition must be afterwards left at the Register Office, and the Order for setting down the Exceptions drawn up, passed and entered, and one Shilling paid for setting them down, and the Order should be immediately served upon the adverse Clerk in Court: and here it should be observed that the Order for setting down the Exception suspends *all further* Proceedings until the Exceptions are heard; but the mere filing the Exceptions and making the Deposit will not stay the Proceeding upon the Report; the Solicitor for the excepting Party must leave a Copy of the Report and the Exceptions with the Lord Chancellor's Gentleman of the Chamber three or four Days before the Exceptions come on to be heard, with a Fee of five Shillings; and an Affidavit of Service of the Petition should be made and filed, and an Office Copy in readiness at the Hearing; and the opposite Side would act prudently in being prepared with an Affidavit of having been served with the Order for setting down the Exceptions, in the Event of the Petitioner not appearing to support his Petition; each Party must give a Brief of the Report, with Copies of the Exceptions to Counsel, and such other Instruction as may be thought useful to support their Case: if upon the Hearing the Exceptant prevails, and the Court allows any of the Exceptions, an Order will be made to return him back the Deposit; but if the Report appears right in any one Instance (a), and the Exceptions

(a) 1 Cox. 249. 4 Bro. C. C. 1.

are over-ruled, the other Side, to whom the Deposit is to be paid, draws up the Order, and upon Production of which to the Register, he receives from him the Deposit, deducting a Poundage of five per Cent.; and if the Court should give Costs beyond the Deposit, which upon Exceptions to Reports of Insufficiency of Answers, rarely happens, the Order must be left at the Master's Office, with a Bill of the Costs of the Reference, and the usual Warrants on leaving and to proceed taken out, served, and attended, and the Master's Certificate of the Costs taxed, filed at the Report Office, and the Costs recovered by Subpœna, for which Instructions have been before given.

Reference of Title in Suits for specific Performance.

In treating of interlocutory Applications, it may be useful to premise, that great Delay and Expense have been spared to the Suitor, by the Court allowing that to be done upon Motion (a) which could formerly have been accomplished only by a Decree; for as Lord Eldon remarks, the Practice is altered very much for the worse, if many Motions which are now made to prevent fruitless Litigation, do not produce the Effect of terminating the Dispute (b).

In Suits for the specific Performance of Contracts for the Purchase of Estates, where the Record raises merely the Question of Title, and the latter is the sole Matter in dispute, both Parties agreeing that if there is a good Title, there ought to be a specific Performance of the Contract; the Court upon a summary Application, will make an Order of Reference to a Master, to enquire if a good Title can be made to the Estate and Premises in Question; and the interlocutory Order made on this Reference, will have the Effect of a decretal Order, as if the Cause had been regularly brought on to a Hearing, and a Decree pronounced (c).

(a) 14 Ves. 139.

(b) 1 Meri. 375.

(c) 1 Ves. and Bea. 224.

351. 1 Meri. 19. 138. 2
Ves. and Bea. 378.

The Reference may be extended to all that regards the Title, as whether it appeared by the Abstract that a good Title could be made (*a*) ; and if the Circumstances made it material, the Order may contain a Direction, that if the Master finds a good Title can be made, then to enquire when such good Title was first shewn to the Purchaser ; but if the latter Direction has been omitted, no second Order for such Purpose will be granted before the Master has made his Report (*b*). The Vice-Chancellor has observed, that where the Circumstances of the Case make it material, on Enquiry when a good Title was first shewn to a Purchaser, it should be asked for in the first Instance ; but that although in Strictness it ought not to be made Part of the Order, for that if the Master should be of Opinion that a good Title could not be made, the Direction would be nugatory ; yet to avoid the Expence of a second Order and Report, his Honour made the Order as to both, and the Practice is so settled (*c*) : but it should be observed, that where the Title is the only Subject of Dispute between the Parties, the Court will not on Motion make an Order for a Reference, if the Performance of the Contract is resisted on other Grounds (*d*) ; but the Court will satisfy itself that the latter Objection is substantial, where the only other Ground of Objection was, that the Time of taking Possession had been made of the Essence of the Contract, which upon looking into it, did not appear to be the Fact. Lord Eldon, observing that the Motives inducing a Party to enter into a Contract, are not to be considered, unless expressed in the Contract itself, held that the Application for the Reference came within the Rule, and granted the Order (*e*) : and in a subsequent Case, where the Performance of the Contract was resisted upon other Grounds

(*a*) 1 Madd. Rep. 211.

(*d*) 12 Ves. 17. 1 Ves. and

(*b*) 3 Madd. 279. 2 Ves. Bea. 1. 351. 516. 1 Meri. 19.
and Bea. 103.

104.

(*c*) 3 Madd. 496.

(*e*) 1 Ja. and Wa. 419. 1

Swanst. 551, notis.

'than mere Defect of Title, the Court looked into the Answer to see if those other Grounds were substantial or frivolous (*a*). In some Instances, to the Order of Reference has been added a Direction for Compensation, if the Report should be against the Title, but not for Indemnity (*b*); and where the Reference is merely to look into the Title, Lord Eldon holding the Answer not necessary before the Reference (*c*), the Order has been made *before Answer*, upon the Plaintiff undertaking to do all such Acts for the Purpose of executing what the Court thinks right, as if the Answer had been filed, and the Cause brought on to a Hearing (*d*), the Defendant admitting that he has no Objection to the specific Performance, upon his being indemnified as to the Title (*e*): but if the Record furnishes a Question, whether there ought to be a specific Performance, or if more than the Title is in Dispute, a Statement to that Effect by Defendant's Counsel upon the Application, has been held sufficient to refuse the Reference (*f*). Where a Defendant objected to the Title, and claimed a Compensation for a Deficiency in the Quantity of Land sold, the Order was refused (*g*): so, if the Answer upon Reasons solid or frivolous, insists the Agreement ought not to be executed, unless the Objection is removed by Consent, no Reference will be made (*h*). The interlocutory Order made on these Applications operates as a decretal Order; the Plaintiff cannot dismiss the Bill as a Matter of Course, but he is in the same Situation as if a Decree to that Effect had been made (*i*). If the Plaintiff does not proceed, the Court will not discharge an Order to dismiss for Want of Prosecution, but leave the Plaintiff at Liberty

(*a*) 1 Turn. Rep. 78.

(*b*) 1 Ves. and Bea. 224.

(*c*) Ibid.

(*d*) 1 Ves. and Bea. 224.
3 Madd. 470.

(*e*) 1 Meri. 372.

(*f*) 3 Madd. 470.

(*g*) 1 Meri. 19. 1 Ves. and
Bea. 516. 12 Ves. 17.

(*h*) 1 Ves. and Bea. 3. 352.

(*i*) 2 Ves. and Bea. 378.

to proceed as if no such Order had been made (a). Where upon a Reference, the Report was against the Title, a Doubt was entertained, whether the Court could give the Costs of the Application on Motion, or by setting down the Cause for further Directions: Lord Eldon observing, that where Suits of this kind had gone such Length on Motion, it would be mischievous not to follow it up in the same Way, made an Order upon Motion to dismiss the Bill with Costs (b).

To obtain an Order of Reference of Title, a Notice in Writing must be served upon the Defendant's Clerk in Court two Days previous to the Motion, of the Plaintiff's Intention to move the Court, "That it may be referred to one of the Masters of the Court to enquire and state to the Court, whether the Plaintiff can make a good Title to the Estate and Premises in Question in the Cause; and in Case the Master shall find that a good Title can be made to the said Estate and Premises, then that he may be directed to enquire and state to the Court when it was first shewn that such good Title could be made, with the usual Directions for Production of Deeds, Papers, and Writings, and Examination of Witnesses, &c."

A Brief of the Bill and Answer (if any has been put in) must be prepared and given to Counsel, with such other Instructions as may be necessary, and Care should be taken that the Notice should be extended to an Enquiry as to the Time when a good Title was first shewn to a Purchaser (c), and an Office-Copy of the Affidavit of Service of the Notice should be in Readiness when the Question comes on: the Solicitor should attend with the Office-Copy of the Defendant's Answer, and all other material Papers and Documents, and be prepared to give such Information as the Court may require. The Order must be drawn up by leaving the Counsel's Brief with the Register, and passed and entered in the usual Course, and a Copy of the Order

(a) 2 Ves. and Bea. 377.

(c) 3 Madd. 280.

(b) 19 Ves. 351.

left at the Master's Office, to whom the Reference is made, accompanied by a State of Facts collected from the Case made by the Bill and the Admissions in the Defendant's Answer; and any other auxiliary Facts and Circumstances copied Draft-wise, and a Warrant taken out on leaving the State of Facts and successive Warrants "to proceed on the State of Facts," taken out and served on the Defendant's Clerk in Court. The Defendant's Solicitor must take an Office-Copy of this State of Facts, and the Insolvent Court Attorneys would act wisely in paying for their Office-Copies, if they expect their Attendance to be allowed. Witnesses may be examined by the Plaintiff in Support of his State of Facts, for which Instructions have been already given (a); and the Defendant may cross-examine those Witnesses; but in general Practice, the Defendant is not allowed to examine Witnesses in chief, under the Plaintiff's State of Facts (b); to let in such Evidence, the Defendant must lay a Ground by bringing in a State of Facts of his own preparing. The State of Facts must be proceeded upon, and when the Master has gone through the Enquiry, a Draft of his Report will be prepared, an Office-Copy of which must be taken by the Solicitors for both Parties. A Warrant on preparing the Draft must be taken out, and Warrants to settle the Draft taken out and served on the Defendant's Clerk in Court, in the usual Course; and when the Master has settled the Draft, a four-Day Warrant to sign the Report must be taken out and served upon the Defendant's Clerk in Court; and if no Objections are brought in, the Master will sign the Transcript of his Report, which the Party in whose Favour it is made usually takes away and files in the Report Office, taking from thence an Office-Copy for Use. If any further Proceedings are necessary, the Cause must be brought on for further Directions in the usual Course, for which Instructions have been before given (c);

(a) Ant. pa. 339.

(c) Ant. pa. 436.

(b) 19 Ves. 596. 599.

but where the Report is against the Title, the Defendant may by special Motion dismiss the Bill with Costs, without setting it down for further Directions (a).

As connected with Suits for specific Performance of Purchases, may be considered an Application by Motion, with Notice for Payment of the Deposit into Court, as well for Security of the principal Sum, as to prevent the Loss of Interest, the Risk resting wholly with the Vendor; for although the Auctioneer is, to a certain Extent, the Stakeholder for Vendor and Vendee, yet as to any Risk regarding the Deposit, the Auctioneer is considered as the Agent of the Vendor, and any Loss incurred would fall upon the latter only; but the Auctioneer when Party, would be allowed by the Order to deduct from the Deposit, his Costs and Expences (b).

Reference of a Bill of Foreclosure.

The 7th Geo. 2. c. 20, enacts, That where any Suit shall be brought in any Court of Equity, by any Person having or claiming any Estate in Land or Hereditaments, by Mortgage to compel the Defendants to pay the principal Money and Interest due on such Mortgage, together with any Sums due on any Incumbrance or Specialty charged on the Equity of Redemption thereof; and in Default of Payment, to foreclose such Defendant of the Right or Equity of redeeming such mortgaged Lands or Hereditaments; the Court in which such Suit is depending, upon Application by the Defendant in such Suit, having a Right to redeem such mortgaged Lands or Hereditaments, and upon admitting the Right and Title of the Plaintiff in such Suit, may before such Suit shall be brought to hearing, make such Order or Decree therein as such Court might or could have made, in Case such Suit or Cause had been regularly heard before such Court; and all Parties thereto shall be bound by such Order or Decree, as if made by such Court at or subsequent to the Hearing of such Cause or Suit;

(a) 19 Ves. 351.

(b) 1 Madd. Rep. 596. 4
Madd. 239.

but the Act does not extend to any Case where the Person against whom the Redemption is prayed by Writing under his Hand, or of his Attorney, Agent, or Solicitor, to be delivered before the Money is brought into such Court of Law, to the Attorney or Solicitor, for the other Side; shall insist either that the Party praying a Redemption has not a Right to redeem, or that the Premises are chargeable with other or different principal Sums than what appear upon the Face of the Mortgage, or shall be admitted on the other Side: nor where the Right of Redemption is controverted or questioned by different Defendants in the same Suit, nor to the Prejudice of any subsequent Mortgagees or Incumbrancers.

The Defendant is entitled under this Statute to an immediate Reference, by a summary Application upon Petition or on Motion, with Notice to the adverse Clerk in Court, “ That it may be referred to one of the Masters to take an Account of what is due to the Plaintiff for Principal, Interest, and Costs at Law and in Equity, upon the Mortgage in the Pleadings mentioned; and that upon Payment thereof, the Plaintiff may be directed to assign and reconvey the mortgaged Premises to the Defendant, or to such Person as he shall direct such Conveyance to be settled by the Master, with the usual Directions, and that in the mean Time all Proceedings at Law may be stayed.

The Course of Proceeding under the Order of Reference is similar to, and partakes so much of the Proceeding under a Reference of Title in Suits for specific Performance of Contracts, that a Reference to the one may serve in the ordinary Course as Instructions for the other: but it may be useful to subjoin, that if a Defendant be in Contempt, he cannot be heard until he has cleared his Contempt (*a*); and another indispensable Requisite is, that the Bill be strictly confined to a mere Foreclosure; if any other Subject de hors the Mortgage is involved, the Statute does not apply (*b*); nor would the Court make any Order, if by

(*a*) 13 Ves. 560.

(*b*) 7 Ves. 489.

the Proceedings at Law the Mortgagee is entitled to take out Execution (*a*). It may not be improper to remark, that the Reference is considered as an Admission of the Mortgage, and of the Principal Money, and Interest due, so much so, that the Master is not allowed to receive any Evidence controverting those Facts (*b*).

It remains to subjoin, that the Act giving the Effect of a Foreclosure by a short Order, puts the Case exactly in the Situation, as if it had been regularly brought to a Hearing, the Intent of the Act being to give the Court Jurisdiction to enlarge the Time for Payment on the usual Terms ; upon an Application for farther Time, Lord Eldon observing, that in Suits of Foreclosure, a Court of Equity is enabled to make the same Order as upon a formal Hearing, and afterwards act as in Cases of that Sort ; and that under the Act he was authorized to make the like Order, enlarged the Time for Payment of the Mortgage Money reported due, and referred it back to the Master to compute the subsequent Interest and Costs (*c*).

(*a*) 3 Ves. and Bea. 15.

b) 4 Ves. 105.

(*c*) Coop. 27. 9 Ves. 36,

BILL OF COSTS

FOR

A PLAINTIFF

On Proceedings against a Peer or privileged Person.

MICHAELMAS TERM, 1823.

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Taking Instructions for Bill	0	13	4			
Drawing Warrant to prosecute and filling up same on Stamp -	0	7	6			
Drawing Bill and fair Copy (a), fol. 50 - - -	2	10	0			
To Mr Roupell and Clerk therewith	2	4	6	0	2	6
Attending him - - -	0	6	8			
Engrossing Bill - - -	1	5	0			
Paid for Parchment and Duty	0	8	6			
Paid filing same - - -	0	7	4			
Drawing Petition to the Lord Chan- cellor for his Letter Missive, en- grossing and Duty -	0	5	7			
Paid answering same, and for Letter Missive - - -	1	6	7			
Paid for Office Copy Bill, to serve on the Defendant with the Letter Missive - - -	2	18	4			
Copy of the Petition to serve there- with - - -	0	1	0			
Service thereof in Town -	0	5	0			

(a) See preceding Observations.

802 BILL OF COSTS FOR A PLAINTIFF, &c.

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Term Fee, Clerk in Court, and Solicitor	-	-	-	0	16	8
Letters and Messengers	-	-	-	0	5	0

HILARY TERM, 1824.

Præcipe for Subpœna and attending to leave same, and afterwards for Subpœna	-	-	0	6	8
Subpœna	-	-	0	8	0
Service thereof at Defendant's House	-	-	0	2	6
Drawing and engrossing Affidavit of Service, Duty, &c.	-	-	0	7	7
Filing same, and Office Copy	-	-	0	6	1
The Defendant not having put in his Answer in Time, Instructions for Counsel to move for a Sequestration Nisi	-	-	0	2	4
Fee to him therewith	-	-	0	10	6
Attending him, and Court	-	-	0	6	8
Paid for Order and Entry	-	-	0	6	6
Copy and Personal Service thereof	-	-	0	5	0
Term Fee, Clerk, and Solicitor, the Defendant having obtained an Order for Time	-	-	0	16	8
Letters and Messengers	-	-	0	5	0

PRACTICAL DIRECTIONS

AND

REMARKS,

ON THE

FOREGOING BILL OF COSTS.

WHEN a Peer, Peeress, or a Lord of Parliament, is Defendant: since the Union with Ireland, Irish Peers, with the Exception of those who are Members of the House of Commons, being entitled to Privilege of Peerage (a); the Lord Chancellor's Letter Missive, requiring an Appearance to the Bill, must be obtained, and served on such Defendant; with an Office-Copy of the Bill, signed by the Six Clerk, must be left with the Letter Missive. The Letter Missive is obtained by Petition to the Lord Chancellor, (*see Title, "Petition."*) The Petition is left with Mr. Farrer, in Lincoln's Inn Fields, the Lord Chancellor's Secretary; he will get it answered, and return it with the Letter Missive.

The Letter Missive, together with a Copy of the Petition, and the Lord Chancellor's Order thereon, upon which the Letter is grounded, and an Office Copy of the Bill, signed by the Six Clerk, must be left with the Defendant personally, or at his Place of Residence. If the Defendant neglects to enter an Appearance within the Time mentioned in the Letter, a Subpœna to appear and answer must be obtained; and if after regular Service of the Subpœna, he does not enter an Appearance, an Affidavit must be made of the Service of the Letter Missive and Subpœna, and of the Copy of the Petition and Bill, on which a Motion must be made to the Court, as of Course, *that a Sequestration may issue against the Defendant's real and personal*

(a) 8 Ves. 601. 1 Ves. and Bea. 419.

Estate. On this Motion, an Order will be made for a Sequestration; “unless the Defendant, being personally served with the Order, shall within eight Days after Service, shew Cause to the contrary.” This Order *nisi* must be personally served on the Defendant, if practicable; but the Court on being satisfied of the Impracticability of such Service, by an Affidavit of the Circumstances, will on Motion, make an Order, that Service of the Order *Nisi*, by leaving it at the Residence of the Defendant, shall be good Service (a). If the Defendant does not enter his Appearance within eight Days after Service of the Order *Nisi*, on Certificate of his Default from the Six Clerk, and on an Affidavit of the Service of the Order *Nisi*, the Court on Motion, will make the Order absolute for a Sequestration; the Clerk in Court, having the Order left with him, and being furnished with Commissioners’ Names, will make out the Writ of Sequestration, and the Commissioners named in the Writ may then sequester the real and personal Estate of the Defendant, and this Sequestration will not be discharged until the Defendant has cleared his Contempt, by entering an Appearance, and paying the Costs of the Sequestration. When the Defendant has appeared, he is not obliged to take another Office-Copy of the Bill, but may file his Answer from the Office-Copy served on him. If the Defendant fails to put in his Answer in Time, an Order *Nisi* for a Sequestration may in like Manner be obtained, which being served as before directed, may be made absolute, on a Certificate from the Six Clerk that the Answer is not filed, and upon Affidavit of the Service of the Order *Nisi*, together with a Certificate from the entering Register of no Cause having been shewn against the Order, dated on the Day the Motion is made..

(a) 5 Ves. 113.

PLAINTIFF'S BILL OF COSTS,

*For setting down a Demurrer, Plea, and Answer, and
Argument of Plea.*

IN CHANCERY.

Between William Willshire,

PLAINTIFF,

AND

Richard Tristram,

DEFENDANT.

TRINITY TERM, 1824.

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
PAID for Office-Copy of Defendant's Demurrer, Plea, and Answer, fol.						
46 - - - - -	2	13	8			
Drawing and engrossing Petition to set down Plea for Argument	0	6	7	0	6	7
Paid answering same -	0	10	0	0	10	0
Attending Register to draw up and enter Order - - -	0	6	8			
Paid for Order, Entry, and Service	0	10	0	0	10	0
Paid setting down Plea -	0	1	0	0	1	0
Drawing and engrossing affidavit of Service, Duty, and Oath	0	7	7	0	7	7
Paid filing same, and for Office-Copy	0	6	7	0	6	7
Abbreviating Bill, Plea, and Answer, fol. 96 - - - - -	1	12	0			
Making Copy thereof for the Lord Chancellor - - -	1	12	0	1	12	0
Paid on leaving - - -	0	5	0	0	5	0
Making two fair copies for Counsel, 8 Brief Sheets each -	2	13	4	2	13	4
To Mr. Sugden therewith, and Clerk	3	5	6	3	5	6
Attending him -	0	6	8	0	6	8

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
To Mr. Roupell and Clerk -	2	4	6	2	4	6
Attending him -	0	6	8	0	6	8
Attending Court Plea Order to stand						
for an Answer, with Liberty to except	1	0	0	1	0	0
Paid Court Fees -	0	6	0	0	6	0
Paid for Order -	0	16	0	0	16	0
Paid entering same -	0	4	0	0	4	0
Attending Register to draw up and						
enter Order -	0	6	8	0	6	8
Drawing and fair Copy Exceptions,						
fol. 16 -	0	16	0	0	16	0
Fee to Mr. Roupell to settle and sign	1	1	0			
Term Fee, Clerk, and Solicitor	0	16	8			
Letters and Messengers -	0	5	0			

PRACTICAL DIRECTIONS AND REMARKS

ON

DEMURRERS.

IN considering further the Nature and various Modes of Defence to Bills (*a*), it may be a convenient Distribution of the Subject here to observe, that whenever any Ground of Defence is apparent on the Face of the Bill itself, either from Matter contained in it, or from Defect in its Frame, or in the Case made by it, the proper Mode, as laid down by the noble and learned Author so often referred to, is by *Demurrer*; the principal Ends of which are, *to avoid a Discovery which may be prejudicial to the Defendant, to cover a defective Title, or to prevent unnecessary Expense*: if no one of these Ends are accomplished, there is says Lord Redesdale, little Use in a Demurrer (*b*).

A *Demurrer* is an Allegation of a Defendant, which admitting the Matters of Fact (*c*) alleged by the Bill to be true, shews that as they are therein set forth, they are insufficient for the Plaintiff to proceed upon, or to oblige the Defendant to answer (*d*), or that for some Reason apparent on the Face of the Bill, or by the Omission of some Fact which ought to be contained therein; or for Want of some Circumstance which ought to be attendant thereon, the Defendant ought not to be compelled to answer. It therefore

(*a*) Ant. pa. 138.

(*b*) Red. Tr. Ch. 87.

(*c*) 1 Ld. Raym. 18.

(*d*) Red. Tr. Ch. 87. Prac.
Reg. Wy. Ed. 162.

demands the Judgment of the Court, whether the Defendant shall be compelled to make Answer to the Plaintiff's Bill, or to some Part to which the Demurrer applies (a).

Demurrers are distinguished by being either *general* or *special*: *general*, where the Pleading is defective in Substance, and no specific Cause assigned: *special*, where the Imperfection is pointed out, and the Objection is merely to the Form of the Pleading. A Demurrer admits the Facts alone, that are well pleaded (b), without the Conclusion of Law (c); and it also expresses the several Causes of Demurrer (d). If the Demurrer does not go to the whole Bill, it must clearly express the particular Parts demurred to (e); for as a very valuable Work of Practice observes, where a Demurrer is accompanied by an Answer, the Court is not to be at the Trouble of looking into the Bill and Answer to see what is covered by the Demurrer, especially if the Answer has been excepted to (f). If a Demurrer is general to the whole Bill, and there is any Part of the Bill uncovered, it has been generally considered that the Demurrer being entire, must be over-ruled (g); but although the same Matter might be insisted on by Answer (h), there are Instances of allowing a Demurrer in Part (i). A Defendant may put in separate Demurrers to separate and distinct Parts of a Bill, for separate and distinct Causes (k); for the same Ground of Demurrer frequently will not apply to different Parts of a Bill, though the whole Bill may be open to a Demurrer. In such Case one Demurrer may be over-ruled on Argument, and another allowed (l), for it is

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|---|---|
| (a) Coop. 110. 3 P. Wms. 80. | (g) 1 Ves. 248. 1 Swans. 304. |
| (b) 1 Ves. 426. 1 Ves. j. 289. | (h) 2 Ves. 357. 1 Atk. 451. |
| (c) Ld. Raym. 18. 3 Meri. 503. | 11 Ves. 70. |
| (d) Ord. Canc. Be. Ed. 1. | (i) 2 Eq. Ca. Abr. 759. 3 Bro. P. C. 538. |
| 1 Atk. 543. | (k) 3 P. Wms. 149. 1 Atk. 544. |
| (e) 2 Ves. 451. 2 Soli. and Lecfr. 207. Red. Tr. Ch. 171. | (l) 3 P. Wms. 148. Red. Tr. Ch. 174. |
| (f) 2 Madd. Ch. 283. | |

no Objection to the Allowance of a Demurrer to Part only of a Bill, where the Answer goes to the Residue, that the Demurrer is equally applicable to the whole Bill (*a*): where a Demurrer is general to the whole Bill, an Answer to Part of the Bill is inconsistent, and over-rules the Demurrer, it being decided, that if a Defendant answers to any Part of the Bill to which he has demurred, he waives the Benefit of the Demurrer (*b*): or if he pleads to any Part of a Bill before demurred to, the Plea will over-rule the Demurrer (*c*); and a Demurrer over-ruled, is never allowed, as a Plea frequently is, to stand for an Answer (*d*). Lord Thurlow laid down a general Rule, which has been followed, that a Demurrer, if good to the Relief prayed, is good also to the Discovery sought for the Purpose of Relief, which Lord Alvanley termed one of the wisest Rules ever established (*e*). But a Work of Merit observes, that a Defendant may waive the Rule, and demur to the Relief, and answer to the Discovery (*f*); but he cannot answer the Discovery in Part and demur to Part (*g*), nor can he demur to the Discovery only, and not to the Relief (*h*), for he may be entitled to Relief not through the Discovery, and obtain a Decree, though he has not established his Right through the Defendant's Answer (*i*). A Demurrer cannot be good in Part, and bad in Part (*k*): if it extends to Relief to which the Party is entitled, it will be bad, though there is some Relief to which he is not entitled (*l*): but if the Plaintiff relies upon the Sufficiency of the Bill, or is advised that the Demurrer is defective, he may take the Judgment of the Court; or if by amending, he can remove the Ground of Demurrer, he may obtain an Order, as of course, by Motion

(*a*) 1 Cox. 416.

(*b*) 2 Atk. 157. 3 P. Wms. 79.

(*c*) 2 Atk. 282. Red. Tr.
Ch. 171.

(*d*) 3 Atk. 530.

(*e*) 3 Ves. 347.

(*f*) 1 Ves. 2. 2 Madd. Ch. 286.

(*g*) 2 Atk. 157.

(*h*) 2 Bro. C. C. 124.

(*i*) 1 Swaust. 294.

(*k*) 1 Atk. 451. 2 Atk. 388.
5 Ves. 173.

(*l*) 17 Ves. 213.

or Petition to the Master of the Rolls, on payment of 20s. Costs, before the Demurrer is set down to be argued, or after it is set down, upon Payment of the additional Costs of the Order for setting it down (a): or if the Demurrer is set down and submitted to, or withdrawn, 5*l.* Costs (b): after a general Demurrer has been argued and allowed, the Bill in strictness is out of Court, and cannot regularly be amended (c); but where the Demurrer is the Want of Parties, Leave is usually given to amend upon Payment of Costs, instead of deciding upon the Demurrer (d). Where a Demurrer has been allowed, if any Part of the Bill is left untouched, the whole Bill is open to Amendment. A Demurrer being in general founded on Matter of Form, is not in general a Bar to a new Bill, but if it has been decided upon the Merits, the Decision may be pleaded in Bar of another Suit (e). After an Answer to the original Bill, if the Plaintiff amends, unless he makes a new Case, a Demurrer will not lie; but whether the Demurrer should be taken off the File or over-ruled, seems not to have been decided (f). It remains to observe, that a Bill, which if all the Parts were disclosed, would be open to a Demurrer, may be so artfully framed, as to avoid a Demurrer; a Defendant must in such Case resort to a Plea, under which he may allege Matter, which if it appeared on the Face of the Bill, would be good Cause of Demurrer; for what is a good Defence by Plea, may frequently be good by Demurrer, if apparent on the Bill (g).

The Defendant by the Course of General Practice, has *eight Days exclusive of the Day of Appearance*, to plead, answer, or *demur*; and, as laid down by Lord Thurlow, until the Defendant is affected with Process of Contempt *actually issued*, or an Order for Time has been obtained, he

(a) Prac. Reg. Wy. Ed.
164. 1 Ves. j. 448.

(b) 6 Ves. 586. 9 Ves. 221.

(c) Red. Tr. Ch. 175.

(d) 2 Ch. Ca. 197.

(e) Red. Tr. Ch. 175.

(f) 1 Cox. 360.

(g) Red. Tr. Ch. 176.

may file a *general Demurrer* to the Bill (*a*): but in an Injunction Cause, if after the eight Days have expired, the Defendant elects to have an Injunction taken against him, upon an ordinary *Dedimus* to take his Answer, though he is not in Contempt, Lord Eldon has expressed a decided Opinion, that the Defendant cannot *demur alone* (*b*). And if the Defendant obtains the *usual Order* to plead, answer or demur, not *demurring alone*, he cannot file a Demurrer unaccompanied by an Answer; but he may put in an Answer and Demurrer, and the Admission in the Answer of a single Fact, though in other Respects the Answer is very insufficient, has been held within the Terms of the Order not to demur alone (*c*), but a mere Denial of Combination has not been so considered (*d*). A Demurrer put in under an Order for Time to *answer only*, would be ordered to be taken off the File (*e*). And if the Defendant through Inadvertence, has obtained an Order for Time to answer *only*, it will not be extended to the Terms of the usual Order (*f*). Recently where the Defendant having been attached for Want of Answer, after the usual Orders to plead, answer, or demur, not demurring alone, put in a Demurrer and Answer, they were both ordered to be taken off the File (*g*). And an Order for a Messenger before the Demurrer and Answer (of which the Plaintiff had bespoken an Office Copy) had been actually taken off the File was discharged with Costs: and so an Answer and Demurrer filed after a peremptory Order for three Weeks further Time to answer, following an Order for a Month to plead, answer, or demur, not demurring alone (*h*) has been suppressed (*i*). By the standing

(*a*) 3 Bro. C. C. 372. 2
Cox. 268.

(*b*) 3 Meri. 304.

(*c*) 9 Ves. 178. 11 Ves. 73.

(*d*) 1 Bro. C. C. 78. 2 P.

Wms. 286. 8 Ves. 526. 10

Ves. 447.

(*e*) Coop. 110.

(*f*) 1 Ves. and Bea. 184.

(*g*) 1 Swans. 185. 189. 1

Wils. C. C. 468.

(*h*) Ibid.

(*i*) 18 Ves. 297.

Orders, after a Contempt duly prosecuted to an Attachment with Proclamation *returned*, no Plea or *Demurrer* shall be admitted but upon Motion and Affidavit, satisfying the Court of the Cause of Delay (*a*); and after an Attachment for Want of Answer, a Defendant can put in an *Answer only*, and not a *Demurrer* and Answer: by the Course of the Court, a special Commission to take the Plea, Answer, or *Demurrer*, is not granted after a Contempt (*b*); and by a late Decision, where a *Demurrer* has been over-ruled, Lord Eldon decided that Time to answer can be obtained only on a special Application (*c*). If a Defendant be brought up by *Habeas Corpus*, to put in an Answer, he cannot demur without Leave of the Court; if he does, the *Demurrer* will be quashed (*d*); but a Defendant standing out to a Sequestration, has been allowed to demur (*e*).

The Defendant's Solicitor having entered an Appearance, by his Clerk in Court, and obtained from him an Office-Copy of the Bill, would act prudently in advising with Counsel upon the Nature of the Suit, and the proper Grounds of Defence. Whether a Bill may be demurred to, being sometimes a Subject of serious and anxious Consideration, and the Preparation of a *Demurrer* requiring great Attention, it seems in all Cases advisable to take the Opinion of Counsel; and if from any Defect in Form or Substance, the Bill may be open to a *Demurrer*, and as the Orders of Court direct that all *Demurrers* must be signed by Counsel (*f*), Instructions should be given to Counsel to prepare the requisite *Demurrer*; and when the Draft has been settled and signed, the Solicitor must make an Engrossment of it upon Parchment, setting the Counsel's Name at the Foot; and as a *Demurrer* is never put in upon Oath, it will be sufficient to deliver the Engrossment not signed by the Party to the

(*a*) Ord. Canc. Bea. Ed. 178.
Prac. Reg. Wy. Ed. 163.

(*b*) 3 Madd. 42. 3 Madd.
190.

(*c*) 3 Madd. 194. 1 Turn.
Rep. 253. 1 Sim. and Stu. 469.

(*d*) Prac. Reg. Wy. Ed. 165.

(*e*) Dick. 30.

(*f*) Ord. Canc. Be. Ed. 127.

Defendant's Clerk in Court to be filed, the standing Orders requiring all Demurrers, &c. to be entered with the Register within eight Days after filing, without making any Deposit, as upon Exceptions: if the Defendant's Clerk in Court should neglect to enter the Demurrer within that Period, the Demurrer would be disallowed as of Course (a). A severe Practiser upon Search at the Register Office, finding no Entry of the Demurrer there, would be strictly regular in taking out a Subpœna for 40s. Costs (b), and also a Subpœna to make a better Answer (c), and proceeding by Process of Contempt, as if no Answer had been filed; but the Irregularity of the Clerk in Court would subject him to the Costs occasioned by his Neglect, and the Court would visit him with the Costs of the Application to restore it. If the Demurrer is regularly entered, either Side may obtain an Order for setting it down to be heard; for this Purpose a Petition, (see *Petitions*) must be left with Mr. Farrer, the Lord Chancellor's principal Secretary, at his Office, in Lincoln's Inn Fields, with a Fee of 10s.; when the Petition is answered (which in strictness it ought to be the Day it is presented, (d)) the Petition must be taken to the Senior Register, and the Order for setting down the Demurrer drawn up, passed and entered, and 1s. paid for setting it down in his Lordship's Paper for Argument; the Order must be served upon the adverse Clerk in Court, two or three Days before the Day appointed for hearing, by delivering to and leaving with the Clerk in Court, or with his Writing Clerk at his Seat in the Six Clerks' Office, a Copy of the Order, shewing the original Order passed and entered. Copies of the Bill and Demurrer must be made and left with the Lord Chancellor's Gentleman, two or three Days before the Demurrer is appointed to be heard, with a Fee of 5s. The Bill and Answer must be fair

(a) Ord. Canc. Be. Ed. 77.

(c) Ant. pa. 791.

174. 3 Bro. C. C. 372.

(d) 3 Meri. 13.

(b) Ant. pa. 790.

copied, brief-wise, and delivered to Counsel, and an Office Copy of the Affidavit of Service of the Order for setting down the Demurrer, should be in readiness upon the Hearing. Here it may be useful to observe, that if the Plaintiff has not an Affidavit of Service of the Order for setting down the Demurrer, the Cause may be struck out of the Paper; but if an Affidavit of Service is produced, that authorizes the Court in the Absence of the Defendant not to over-rule the Demurrer, but to hear the Plaintiff (*a*); if for Want of Appearance it is struck out of the Paper, it cannot be set down again without an Order, which may be obtained on Motion (*b*). The Party setting down the Demurrer should attend the Hearing with the requisite Office Copies of the Pleadings, and if upon Argument, the Demurrer is over-ruled, the Order made upon the Hearing must be drawn up by the Plaintiff's Solicitor, and passed and entered at the Register Office, and on over-ruling the Demurrer, the Defendant pays 5*l.* fixed Costs, and by the late Orders of Court, such further Costs to be taxed by the Master, as the Court thinks fit to award (*c*), and the latter Costs have been given, though not applied for till three Months after the Hearing (*d*); but an Application to extend those Costs to the full Costs of Suit has been refused (*e*). In some Cases no Costs are given; if further Costs are directed, the Order with a Bill of those Costs must be left at the Master's Office, to whom they are referred; the usual Warrants taken out on leaving the Bill of Costs, and to tax, and the Master's Certificate of the Taxation filed at the Report Office, and an Office Copy taken for use. These Costs are recovered by a Subpœna, for which a Præcipe must be left at the Subpœna Office in the Rolls' Yard, producing the Order, or if taxed the Master's Report, for which

(*a*) 1 Swanst. 552.

(*b*) 4 Madd. 403.

(*c*) Ord. Canc. Be. Ed. 320.

456. 1 Ves. & Bea. 307.

(*d*) 1 Madd. Rep. 32. 2

Madd. Rep. 240. 4 Madd.

48. Bea. Costs. 223.

(*e*) 2 Madd. Rep. 348.

Instructions have been given (a). Where a Demurrer was allowed by a common Law Judge sitting for the Lord Chancellor, and the Order was afterwards reversed, the Costs were ordered to be refunded (b). In an early Stage the Defendant has been allowed to withdraw his Demurrer upon Payment of Costs, and if set down, to be argued upon Payment of taxed Costs (c). If the cause of Demurrer on the Record will not hold, the Defendant may at the Bar *ore tenus* assign other Cause (d), but not upon a Ground which he has not made the Subject of Demurrer on the Record (e); and a modern Work, of distinguished Merit, states that Costs are not allowed to either Party upon allowing a Demurrer *ore tenus* (f). Upon over-ruling a Demurrer to the whole Bill, the Defendant has by Leave of the Court been allowed to put in a Demurrer less extended (g), or to make a new Defence by Plea. If the Demurrer is accompanied by an Answer upon over-ruling the Demurrer, Exceptions must be taken to the Answer, and proceeded upon in the usual Course, and as a Demurrer over-ruled is never allowed, like a Plea, to stand for an Answer (h): if no Plea or Answer has been put in, the Plaintiff must take the usual Course to compel an Answer to the whole Bill, as if no Defence had been made (i). After a general Demurrer has been argued and allowed, the Bill is in strict Practice out of Court, and the Defendant may give Notice to dismiss for Want of Prosecution; and he is entitled to 5*l*. Costs from the Plaintiff, to be recovered by the like Process of Subpœna before-mentioned.

(a) Ant. pa. 783.

(b) 1 Ves. 542. 2 Ves. 100.
Dick. 148.

(c) 6 Ves. 586.

(d) 3 P. Wms. 370.

(e) 17 Ves. 213.

(f) Beam. Costs. 223.

(g) 11 Ves. 68.

(h) 3 Atk. 530.

(i) Red. Tr. Ch. 256.

PRACTICAL DIRECTIONS AND REMARKS

ON

P L E A S.

THE Defence proper for a Plea, which has been described as a special Answer, shewing or relying upon one or more Things as Cause why the Suit should be either dismissed, delayed, or barred (*a*), should be such as reduces the Cause or some Part of it to a *single Point*, and from thence creates a Bar to the Suit, or to the Part to which the Plea applies. A Writer of high Character, in treating of the Nature of Pleas, has considered the first Requisite of a Plea (*b*), whether considered as a Part or a Consequence of its Definition, that generally speaking, it brings *new Matter* before the Court (*c*): on this Ground, a Plea of a Sentence of the Admiralty Court recited in the Bill, was over-ruled, as bringing no new Matter on the Record (*d*). A Plea, says Lord Redesdale, rests on some Point founded on Matter stated in the Plea; and as it rests on that Point merely, it admits for the Purpose of the Plea, the Truth of the Facts contained in the Bill, as far as they are not controverted by Facts stated in the Plea (*e*); and as the End of a Plea is to reduce the Cause, or the Part covered by it, to a *single Point*, constituting a Ground why the Suit should be dis-

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| <p>(<i>a</i>) Prao. Reg. Wy. Ed. 324. Red. Tr. Ch. 177. Coop. 223.</p> | <p>(<i>d</i>) 1 Bro. C. C. 56. 2 Madd. Rep. 6.</p> |
| <p>(<i>b</i>) Beam. Pl. 7.</p> | <p>(<i>e</i>) Red. Tr. Ch. 13, 238, 242.</p> |
| <p>(<i>c</i>) Red. Tr. Ch. 13. 178. 2 Madd. Rep. 6.</p> | |

missed, delayed, or barred (*a*) ; in order to save Expense to the Parties of an Examination at large, or to protect the Defendant from a Discovery which he ought not to be compelled to make ; the Court to that End, instantly decides on the Validity of the Defence, taking the Plea, and the Bill, so far as it is not contradicted by the Plea to be true ; a double Plea, therefore, has been held informal and improper ; where to a Bill for specific Performance, a Plea averring two several and distinct Facts, of there being no Contract in Writing, and no Act done in Part Performance, was overruled as double (*b*) ; and *a fortiori*, if the two Facts pleaded are inconsistent with each other (*c*) ; for if two Matters of Defence might be offered by Way of Plea, any Number might be tendered in the same Way, and the Court would be compelled to give instant Judgment on a Variety of Defences with all their Circumstances, before they are made out in Proof, and to decide upon a complicated Case which did not exist : but, says the noble Author, this reasoning does not apply with equal Force to two several Bars, pleaded as several Pleas, though to the same Matter ; and it may be said, that as such Pleading is admitted at Law, it ought therefore to be admitted in Equity (*d*), but considering that a Plea is not the only Mode of Defence in Equity, there is not the same Necessity as at Law : but the Rule requiring a Plea in Equity to reduce the Cause to a *single Point*, has been held not to render a Plea bad which consists of a Variety of Circumstances, if they all tend to the same Point (*e*). On this Ground a Plea of a Conveyance, Fine, and non-Claim to a Bill impeaching the Conveyance, was held good, as amounting only to the single Point of a Plea

(*a*) 1 Atk. 54. 2 Ves. j. 84. (*d*) Red. Tr. Ch. 239. Beam.
514. 1 Bro. C. C. 404. 2 Pl. 14. Coop. 226. 1 Jurd.
Ves. and Bea. 155. Arg. 482.

(*b*) 1 Bro. C. C. 404.

(*e*) Red. Tr. Ch. 239. 1

(*c*) 4 Bro. C. C. 258. 2 P. Wms. 725. 15 Ves. 79.
Ves. j. 84. 514. Beam. Pl. 18.

VOL. I.

3 G

of Title (*a*); and it would seem that an Allegation of mere *Surplusage*, will not prejudice a Plea in Equity, by rendering it multifarious or double (*b*); but it may be proper to remark, that a Plea can be allowed in Part only with respect to its Extent, or the Quantity of the Bill covered by it; and if any Part of the Defence made by the Plea is bad, the whole will be bad (*c*): and although the Plea reduce the Cause to a single Point, and so far tenders an Issue, as every Plea ought (*d*); it must be such an Issue as by the Doctrines of the Court is material to delay, dismiss, or bar the Bill, which Lord Eldon expressly recognized in over-ruling a Plea, on the Ground that it tendered an *immaterial* Issue, which in its Decision would not terminate the Cause, but leave an important Point for future Discussion (*e*). Another Requisite is, that every Plea in Equity should be *direct and positive*, and not by Way of *Argument, Inference, and Conclusion*, which have a Tendency to create unnecessary Prolixity and Expense (*f*). To a Bill charging constructive Notice, a Plea averring that there was not any Notice, constructive or actual, was over-ruled, on the Ground that the Defendant not having denied the Facts charged, whence the Construction was to be deduced, had taken upon himself to draw the Conclusion, instead of leaving it to the Court, to whose Province it belonged (*g*).

A Plea must clearly and distinctly aver all the Facts necessary to render the Plea a complete equitable Bar, so far as the Plea extends, to which the Plaintiff may reply, and not in the Nature of a Demurrer, rest on Facts in the

(*a*) 2 Bro. C. C. 274. 1 P.
Wms. 387. 1 Bro. C. C. 417.

(*b*) 14 Ves. 59. 13 Ves. 25.

(*c*) Red. Tr. Ch. 240.

(*d*) 1 Ves. j. 371. 2 Bro.
C. C. 292.

(*e*) 18 Ves. 175. 1 Chitt.
Pl. 629.

(*f*) 1 Chitt. Pl. 518. Coop.
225.

(*g*) 4 Bro. C. C. 321. 13
Ves. 29. 2 Sch. and Lefr.
305. 1 Ves. j. 371.

Bill (*a*), Averments ought in general to be positive (*b*): recently, a Defendant has been permitted to aver according to the best of his Knowledge and Belief, as that an Account is just and true (*c*): In all Cases of negative Averments, and of Averments of Facts not within the immediate Knowledge of Defendant, it may seem improper to require a positive Assertion. Averments are necessary to exclude Intendments which would otherwise be made against the Defendant, and they must be sufficient to support the Plea (*d*). If, says the noble Author, there is any Charge in the Bill which is an equitable Circumstance in Favour of the Plaintiff's Case against the Matter pleaded, as Fraud or Notice of Title, that Charge must be denied by Way of Answer as well as by Averment in the Plea (*e*); and therefore, in some Instances, *a Plea must be accompanied and supported by an Answer* (*f*); and in such Case, where the Bill suggests an Equity against the Bar, the Answer must be full and clear, or it will not be effectual to support the Plea (*g*); for the Court will intend the Matters (the Equitable Circumstances) so charged against the Defendant, unless they are fully and clearly denied: but if such Charges are in Substance fully and clearly denied, it has been held sufficient to support the Plea, although all the Circumstances alleged in the Bill be not precisely answered (*h*), with Reference, as a Work of Merit observes, to the two-fold Object of supporting the Plea, and excluding Intendments against the Defendant; for, though the Court, upon Argument of the Plea, may hold these Charges in the Bill sufficiently denied by the Answer, to exclude Intendments against the Defendant,

(*a*) 2 Ves. 243. 1 Bro.
C. C. 578. 1 Cox. 224.

(*b*) Red. Tr. Ch. 240. 3
Atk. 586.

(*c*) 3 Atk. 70. 2 Ves. and
Bea. 159.

(*d*) 2 Ves. 225.

(*e*) Red. Tr. Ch. 195, 241.
2 Sch. Lefr. 727. 1 Anst. 59.

(*f*) Prac. Reg. Wy. Ed.
328. 3 Atk. 303. 6 Ves. 586.

(*g*) 3 Atk. 304, 815. 3 P.
Wms. 145.

(*h*) 3 Bro. P. C. 373. Gilb.
Rep. 184. Coop. 328.

if the Plaintiff should think the Answer to any of them evasive, he may except to the Sufficiency of the Answer on those Points (*a*), and the Defendant may support his Plea by Answer to the Matters not charged by the Bill, as Notice of Title, Fraud, &c. for by such Answer nothing is put in issue, covered by the Plea, from being put in issue, and the Answer can only be used to support or disprove the Plea (*b*): but if Defendant answers to Part and pleads to the rest of the Bill where the Plea should have extended to the whole, it is bad in Form, and will be overruled (*c*). And where, says Lord Redesdale, Facts appear upon an Answer to an original Bill, which would operate to avoid a Defence made by Plea to an amended Bill, the Answer to the original Bill may be read on the Argument of the Plea to counterplead the Plea: so it should seem if an Answer to an original Bill, would disprove an Averment in a Plea to an amended Bill, the Court might permit it to be read for that Purpose (*d*): for, generally, if an Answer extend to any Part of the Bill covered by the Plea, it will be fatal to the Plea upon Argument (*e*). A *Plea may extend to the whole Bill, or to Part only of the Bill*; where the Plea is to the whole Bill, if it does not extend to, or cover the whole, the Plea is bad (*f*): but if the Plea does not go to the whole of the Bill, it must express to what Part of the Bill the Defendant pleads, for if the Parts of the Bill to which the Plea extends are not clearly and precisely expressed, as if the Plea is general with an Exception of Matters after mentioned, and is accompanied by an Answer, the Plea is bad; for the Court cannot judge what the Plea covers without looking into the Answer, and determining whether it is sufficient or not, before the

(*a*) Red. Tr. Ch. 200.

(*e*) 2 Atk. 155. 281. 3 P.

(*b*) Gilb. Ch. 58. 3 Atk. 303.

Wms. 79. 6 Bro. P. C. 4. 2 Ves. 107.

(*c*) 1 Madd. Rep. 322.

(*f*) 16 Ves. 262. 2 Ves. &

(*d*) Red. Tr. Ch. 242.

Beam. 259. Coop. Rep. 229. 5 Madd. 64.

Validity of the Plea can be determined (*a*). A Plea may be objectional, not on the Ground of covering too little, but on the Ground of its covering too much (*b*): where the Bill prayed a Discovery only, and the Plea was to the Discovery and Relief, it was over-ruled (*c*). And if one Defence is made by the Answer, and another Defence by the Plea, the Plea will be ordered to stand for an Answer (*d*); for wherever a Plea is to the whole Bill, if it is a Bar at all, an Answer to any Part of the Bill over-rules the Plea (*e*). Recently the Vice-Chancellor allowed a Plea with an Exception, requiring no Reference to any other Part of the Answer, as not being within the Rule (*f*); but *a Plea may be bad in Part, and not in the whole* (*g*), and the Court will allow it to so much of the Bill as it is properly applicable (*h*), but not so, if it be a Plea to the Jurisdiction (*i*); but Lord Redesdale observes, that there does not appear any Case in which two Defences offered by a Plea, have been separated, and one allowed as a Bar, and the other disallowed, and that a double Plea is improper; that a Plea can be allowed in Part only with respect to its Extent: the Quantity of the Bill covered by it, and if any Part of the Defence made by the Plea is bad, the whole must be over-ruled (*k*); but it is now fully settled that a Plea is bad, upon the very Ground of its being double (*l*): it has, however, been recently decided that upon special Application, where Circumstances have required it, leave will be given to file a double Plea (*m*).

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|---|---|
| (<i>a</i>) 2 Ves. 108. Red. Tr. Ch. 238. 1 Ves. & Bea. 514. | (<i>g</i>) 1 Atk. 52, 528. 1 Ves. 102. 2 Ves. 389. 1 Ves. j. 426. Red. Tr. Ch. 238. |
| (<i>b</i>) 1 Ves. 246. 1 Anstr. 1. 2 Sch. & Lefr. 721. 1 Ves. & Beam. 227, 511. | (<i>h</i>) Beam. Pl. 45. |
| (<i>c</i>) Bunb. 70. | (<i>i</i>) 2 Ves. 357. Dick. 129. |
| (<i>d</i>) 6 Ves. 12, 17, 580. | (<i>k</i>) Red. Tr. Ch. 238. 240. |
| (<i>e</i>) 1 Anstr. 14. 59. Gwill. 1368. | (<i>l</i>) 1 Bro. C. C. 404. 3 Anstr. 738. |
| (<i>f</i>) 1 Ves. & Bea. 511. 1 Cox. 40. | (<i>m</i>) 4 Madd. 241. 2 Madd. Ch. 299. |

Pleas have been classed under the respective Heads of, *Pleas to the Jurisdiction of the Court; to the Person of the Plaintiff or Defendant; or in bar of the Suit*: of these Pleas to the Jurisdiction, or in disability of the Person of the Plaintiff and Defendant (*a*), or Pleas in bar of any Matter of Record, or of Matters recorded, or as of Record in the Court itself, or of any other Court, need not be on Oath (*b*); but Pleas in bar of Matters *in Pais*, must be put in upon the Oath of the Defendant (*c*).

Pleas of *Outlawry* or *Excommunication*, of a *former Decree*, or of another *Suit depending*, generally are not argued (*d*); the two Former being pleaded *sub sigillo*, cannot be disputed and delay the Suit till the Disability is removed (*e*); but if the Outlawry be for the same Matter, for which Relief sought by the Bill is in Issue, the Plea is Insufficient, and is disallowed of course, and the Plaintiff may take out a Subpoena for a better Answer, and a Subpoena for 5*l.* Costs; after reversal, the Defendant upon a new Subpoena served, and 20*s.* Costs, must Answer as if no Outlawry had been (*f*): but if the Plaintiff conceives the Plea is defective in point of Form, or otherwise Insufficient, independent of the mere Truth of the Fact pleaded, he may set down the Plea to be argued in the ordinary Course, for the Opinion of the Court (*g*), but for this Purpose his Clerk in Court must enter the Plea with the Register within eight Days after filing, or in default, the Defendant may take out a Subpoena for 5*l.* Costs, as if it had been heard (*h*). A Plea of a former Decree, or *lis pendens*, is not set down by the Defendant with the Register (*i*), but generally re-

(*a*) Ord. Canc. Bea. 172.

(*f*) 1 Ves. & Beam. 184.

(*b*) 2 Ves. & Beam. 354. 19 Ves. 81.

Ord. Canc. Beam. 175.

(*c*) Red. Tr. Ch. 243.

(*g*) 3 Atk. 587. 1 Vern. 322. Red. Tr. Ch. 247.

(*d*) Red. Tr. Ch. 246. 1 Atk. 53. Ord. Canc. Beam. 176.

(*h*) Ord. Canc. Be. 176.

(*i*) Prac. Reg. Wy. 327. 3 Bro. C. C. 544.

(*e*) Ib. 175.

ferred by Order, obtained as of course to a Master to enquire into the Fact (*a*); if the Reference be not procured by the Plaintiff, and a Report made thereon, within one Month after filing the Plea, or if the Master should certify that both Suits are for the same Matter, the Bill stands instantly dismissed with five Pounds Costs (*b*), unless the Court order otherwise: but the Plaintiff may except to the Report, and bring on the Matter to be argued before the Court (*c*). In one Instance where the Master reported specially, and the Plaintiff had given some Cause for the Plea, *Lord Hardwicke* overruled the Plea, but without Costs (*d*). If the Plaintiff instead of applying for a Reference, set the Cause down for Hearing, it operates as a Waiver of his Right to such Reference (*e*); and if a Defendant sets down a Plea of a former Suit depending, it will be struck out of the Paper (*f*).

The Defendant has in all Cases *eight clear Days* exclusive of the Day of Appearance, to *plead*, answer, or demur, and he is also intitled to the three usual Orders for Time; and as a Plea on Oath is considered as an Answer, if the Order be to answer only, a Plea alone has been held within the Terms of the Order (*g*). If the Defendant resides above twenty Miles from London, he is entitled to a Commission; and the Vice-Chancellor seems to have held that a special Commission is required to take a Plea, Answer, or Demurrer, under which a Plea alone may be returned (*h*); but it should seem, that under an ordinary *Dedimus*, a Plea only may be returned, if on Oath. The Course of Practice in obtaining and executing a Commission to take a Plea, is similar to the Proceeding in taking an Answer (*i*): but if a Plea, whether accompanied by an Answer or alone, is returned, it must be taken upon Oath, and

(*a*) 2 Ves. & Bea. 110.

(*b*) Ord. Canc. Beam. 177.

(*c*) Red. Tr. Ch. 247.

(*d*) 2 Atk. 44.

(*e*) 1 Atk. 53.

(*f*) 2 Ves. j. 672.

(*g*) 1 Bro. C. C. 56. 2 P. Wms. 464. 16 Ves. 356.

(*h*) 3 Madd. 43.

(*i*) Ant. pa. 541.

so specified in the Caption (a) ; but if it be taken without Oath, it is not one of those Irregularities which can be waived, by the Plaintiff taking a Step in the Cause, so as to prevent it being taken off the File (b) If the Defendant should be advised to defend himself by *Plea*, Instructions, with a Copy of the Bill must be given to Counsel, to frame the appropriate Plea ; and as *all Pleas filed in Town Causes*, must by the general Rule of Practice, be signed by Counsel, though the Signature of Counsel to Pleas taken by Commission is not required (c), the Draft of the Plea prepared and signed by Counsel, must be transcribed upon Parchment in Words at length, with the Counsel's Name at the Foot ; and if it be a Plea requiring the Oath of the Party, it should be very carefully read over by the Defendant, after which he must sign his Christian and Surname thereto in Words at length, which by a General Order (not now attended to) he is required to do in the Presence of the Master when sworn (d) : the Defendant must be taken to the Public Office, in Southampton Buildings, and sworn to the Truth of the Plea, by the attendant Master, and the Plea left with the Clerk at the Public Office, until the Defendant's Clerk in Court, upon Notice by the Defendant's Solicitor, takes it away to file in the Six Clerk's Office. It should not escape the Attention of the junior Practiser, that a Plea or Answer is not a Record, until *actually filed* in the Six Clerks' Office (e) ; and for the Purpose of opposing an Injunction to stay Trial, or to prevent an Attachment or Injunction, a Plea or Answer must be filed at the latest, by eight o'Clock in the Evening of the Day before the Motion or Seal-Day ; a Mistake in the Office-Hours has been held not to be a Ground of Exception to the Rule (f). The Plea must be entered by the Defendant's Clerk in Court with the Register,

(a) 2 Ch. Ca. 208. Ge. For.
Rom. 94.

(b) 2 Ves. and Bea. 357.

(c) 4 Madd. 366.

(d) Ord. Canc. Bea. 452. 3
Atk. 43.

(e) 2 Meri. 474.

(f) 1 Sim. and Stu. 102.

within eight Days from the filing, and if it be not entered within that Period, it stands over-ruled as of course, and the Plaintiff may take out and serve upon the Defendant a Subpœna for 40s. Costs, and also a Subpœna to put in a better Answer (a). Service of the latter upon the Defendant's Clerk in Court is sufficient, and the Plea cannot be set down or debated but upon special Order; but if it be clearly shown to have been occasioned by a Slip of the Clerk in Court, under Circumstances, the Court might be prevailed upon to restore it. If the Plea has been regularly entered with the Register, either Party may obtain an Order to set down the Plea to be argued, but no Deposit is required, as in setting down Exceptions. The Course of Practice in setting down and arguing Pleas, is *mutatis mutandis*, the same as in arguing Demurrers, for which Instructions have been already given (b). It may be useful to observe, that if the Defendant sets down a Plea, and upon its being called on, does not appear, the Plea upon Affidavit of the Plaintiff having been served with an Order to set down the Plea, will be over-ruled, and not struck out of the Paper; but if no such Affidavit be produced, the Plea will be struck out, and a Plea so struck out will not be restored to the Paper, unless upon Affidavit accounting for the Defendant's Solicitor not being prepared when the Plea was called on (c). After a Plea has been set down, if Plaintiff declines arguing it, and desires Leave to amend, the Validity of the Plea is admitted and allowed, with five Pounds Costs (d).

If upon Argument, the Plea is over-ruled, the Defendant pays five Pounds Costs to the Plaintiff, with such further Costs as the Court shall by Order award (e); so, if it be ordered to stand for an Answer, with Liberty to except, the Plaintiff takes out a Subpœna for five Pounds Costs, and files

(a) Ord. Canc. Bea. 171. 3
Bro. C. C. 372.

(b) Ant. pa. 812.

(c) 2 Madd. Rep. 38.

(d) 3 Madd. 183.

(e) Ord. Can. Bea. 456.

Exceptions to the Plea, as in Case of an insufficient Answer; and if the Plea is to the Relief only, the Words, with Liberty to except, should be added to prevent it being established as a good Answer (*a*), but not if the Benefit of the Plea is saved till the Hearing of the Cause, unless given by the Order (*b*). If the Plea is allowed, the Defendant is intitled to the like Sum from the Plaintiff, which, as before observed, may in either Case be recovered by Subpœna (*c*); but in some Cases no Costs are given.

A Plea upon Argument may be allowed simply, or the Benefit of it saved to the Hearing, or ordered to stand for an Answer, or over-ruled (*d*). If upon Argument, the Plea is allowed simply, the Cause is not at an end, but it is a full Bar to so much of the Bill as it covers, if the Matter pleaded with the Averments are true; and whether it be allowed upon Argument; or if without Argument, the Plaintiff thinks it, though good in Form and Substance, false in Fact, he may take Issue upon it and disprove the Facts upon which it is supported (*e*); for if the Plea is submitted to by the Plaintiff, allowed upon Argument, or admitted so by Replication (*f*), the Truth of the Plea is the only Question remaining, so far as the Plea extends, and nothing but the Matters contained in the Plea, or as much of the Bill as it covers, is in issue between the Parties (*g*); and if the Defendant fail in proving the Facts of his Plea, and the Plea is held to be no Bar, the Plaintiff does not lose the Benefit of the Discovery sought, the Defendant may be ordered to be examined upon Interrogatories to supply the Defect (*h*); but if the Defendant proves the Truth of the Facts thus put in Proof, the Suit to the Extent of the Plea

(*a*) 2 Atk. 814. 2 Madd. Rep. 245.

(*b*) Prac. Reg. Wy. 330.

(*c*) Ant. pa. 783.

(*d*) Beam. Pl. 317.

(*e*) Prac. Reg. Wy. 283.

Red. Tr. Ch. 227, 244.

(*f*) 3 Bro. P. C. 74. 3 P. Wms. 95. Prac. Ch. 58.

(*g*) Red. Tr. Ch. 244.

(*h*) 2 Ves. 246. 2 Ves. and Bea. 158.

is at an End (a). Though the Plea be defective in Substance or Form (b), if the *Benefit of the Plea be saved to the Hearing*, it is considered so far as appears to the Court that it may be a Defence; but the Decision of the Cause does not rest upon the Truth of the Plea, the Plaintiff may avoid it, by other Matter, which he is at Liberty to adduce (c): but where a Plea is ordered to stand for an Answer, it is considered merely as containing Matter which may be a Defence in whole or in Part, but not a full Defence, or that it has been informally offered by Way of a Plea, or has not been supported by Answer, so that the Truth is doubtful; for, says Lord Redesdale, if a Plea requires an Answer to support it upon Argument of the Plea, the Answer may be read to counterprove the Plea; and if the Plea is not sufficiently supported by the Answer, the Plea must be over-ruled, or ordered to stand for an Answer only (d). Where a Plea states Matter of Defence not proper for a Plea, or which is improperly pleaded, it is ordered to stand for an Answer, but if it states nothing which can be a Defence, it will be merely over-ruled. If a Plea stands for an Answer, it is a sufficient Answer to so much of the Bill as it covers (e), unless by the Order Liberty is given to except (f): but it may be so qualified, as to protect the Defendant from any particular Discovery (g). And if a Plea be ordered to stand for an Answer, without Liberty to except, the Plaintiff is not precluded from excepting to the Answer accompanying the Plea, as insufficient to the Parts of the Bill not covered by the Plea (h): and where the Plea has been ordered to stand for an Answer, without Liberty to except, the Plaintiff must not take Exceptions and at the same Time serve a Subpoena for a better Answer (i). If

(a) 1 Bro. P. C. 414. 3
Bro. P. C. 558.

(b) 3 P. Wms. 94.

(c) 6 Ves. 18.

(d) 3 Atk. 303. Red. Tr.
Ch. 245.

(e) Mos. 74.

(f) 3 Atk. 815. 3 P. Wms.
239.

(g) 2 Atk. 241.

(h) Mos. 74.

(i) 3 Atk. 303.

the Plea state nothing which may be a Defence, it will be merely over-ruled (*a*); and if a Plea accompanied by an Answer is allowed, the Answer may be read at the Hearing, to counterprove the Plea (*b*).

Where a Plea is accompanied by an Answer, if Exceptions are taken before the Plea is argued, the Plea is admitted to be good (*c*); and if there is an Answer to Part, and a Plea to the Residue, the Plaintiff cannot except till the Plea is argued, or ordered to stand for an Answer, with Liberty to except (*d*). A Plea may be referred for Impertinence, but if afterwards set down for Argument, the Reference is waived, though the Reference has been attended (*e*). Where there has been a Slip or Mistake, and the material Ground of Defence is good, the Court has allowed a Plea to be amended, but the Amendment must be stated, and the Slip accounted for, and a Time to amend limited (*f*). And in a Case in which a Plea seemed incapable of Amendment, the Defendant had leave to withdraw his Plea, and Plead *de novo* in a Fortnight. And where a Plea was clearly good in Substance, but objectionable in Point of Form, as concluding neither in Bar or otherwise, Leave was given to amend the Plea (*g*).

(*a*) Red. Tr. Ch. 245.

(*b*) Dick. 49. Bea. Pl. 320.

(*c*) 2 Atk. 387. 390.

(*d*) 1 Vern. 344.

(*e*) 1 Cox. 412.

(*f*) 2 Anstr. 11. 2 Ves. and Bea. 156. 2 Ves. j. 85.

(*g*) 13 Ves. 435.

THE BILL OF COSTS

UPON

APPLICATION TO DISCHARGE A FORMER SOLICITOR,

And the Taxation of his Bill, and taking Papers and Proceedings out of his Hands.

IN CHANCERY.

BETWEEN *John Delves*,

PLAINTIFF,

AND

Ralph Leycester

DEFENDANT.

MICHAELMAS TERM, 1823.

CHARGE.			TAX OFF.		
£	s.	d.	£	s.	d.

ATTENDING Mr. Leycester taking Instructions for discharging Mr. Shufflebottom, his present Solicitor, and taking the Proceedings out of his Hands -

0 6 8

Attending several Times at Mr. Shufflebottom's Chambers in the Temple, to demand the Papers and Proceedings, and his Bill of Costs, but he denied himself, and no satisfactory Answer could be obtained -

0 13 4 0 6 8

Drawing and engrossing Petition to deliver his Bill of Costs,

0 12 7

Paid answering same -

0 5 6

Attending Register to draw up and enter Order -

0 6 8

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Paid for Order and Entry -	0	13	6			
Copy thereof to serve -	0	4	0			
Service upon Mr. Shufflebottom's Clerk at his Chambers in the Temple -	0	5	0	0	2	6
Attending several Times, endeavouring to serve Order upon Mr. Shufflebottom personally, but without Effect -	0	13	4	0	6	8
Instructions to Mr. Maddock to move that Service of the Order upon Mr. Shufflebottom's Clerk at his Chambers, might be good Service -	0	13	4	0	3	4
Instructions for special Affidavit, in Support of Motion -	0	6	8			
Drawing and engrossing Affidavit, Duty, and Oath -	0	14	7			
Paid filing and for Office Copy	0	13	7			
Gave Fee to Mr. Maddock therewith, and Clerk -	1	3	6	0	2	6
Attending him therewith -	0	6	8			
Attending Court, Order made	0	13	4			
Attending Register to draw up and enter Order -	0	6	8			
Paid for Order and Entry -	0	12	6			
Copies and Personal Service of the two Orders upon Mr. Shufflebottom's Clerk, at his Chambers in the Temple (a) -	0	14	0			
Term Fee, Clerk in Court, and Solicitor (b) -	0	16	8	0	16	8

(a) Service in this Case, by leaving, is 2s. 6d. personally is 5s.

(b) No Term Fee is allowed in *ex parte* Proceedings, nor Letters, &c.

FOR DISCHARGING A SOLICITOR. 831

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Letters and Messengers -	0	5	0	0	5	0

HILARY TERM, 1824.

Instructions to Counsel to move, that Mr. Shufflebottom might stand committed for disobedience of the Order - - -	0	6	8	0	1	2
Drawing and engrossing Affidavit, in Support of Motion, Duty and Oath - - -	0	18	7			
Paid filing and for Office Copy	0	17	7			
Gave Fee to Mr. Maddock, and Clerk - - -	1	3	6	0	2	6
Attending him therewith -	0	6	8			
Attending Court, and Order made that Mr. Shufflebottom should deliver his Bill of Costs in four Days, or stand committed, and that Service of the Order upon Mr. Shufflebottom's Clerk, at his Chambers should be good Service	0	13	4			
Attending Register to draw up and enter Order - - -	0	6	8			
Order and Entry - - -	0	18	1			
Copy and Service of Order as directed in the Temple - - -	0	7	6			
Instructions to move that Mr. Shufflebottom might stand committed for Contempt of Court, for Disobedience of Order, for Delivery of his Bill of Costs - - -	0	2	6			
Drawing and engrossing Affidavit of Service, and that the Bill of Costs had not been delivered, Duty, and two Oaths -	0	16	7			

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
- Paid filing, and for Office Copy	0	14	6			
Gave Fee to Mr. Maddock to move, and Clerk - - -	1	3	6	0	2	6
Attending him therewith -	0	6	8			
Attending Court, Order made	0	13	4			
The Bill of Costs being delivered, perusing and considering same	0	13	4	0	6	8
Feb. 10. Warrant on leaving Bill of Costs, Copy, and Service, in the Temple - - -	0	5	6			
Three Warrants to tax, Copy, and Service - - -	0	16	6			
Paid for Office Copy of Affidavit in Support of Queried Items, and the Fees and Money paid, fol. 15 - - -	0	7	6			
Warrant to Tax, Copy, and Service	0	5	6			
Attending Taxing, Clerk in Court, and Solicitor - - -	0	13	4			
Instructions for Interrogatories to examine Mr. Shufflebottom as to the Sums of Money received, and the Deeds, &c. in his Hands	0	13	4			
Drawing Interrogatories and fair Copy for the Master, fol. 22	1	2	0			
8th. Warrant on preparing Inter- rogatories, Copy, and Service	0	5	6			
10th. Warrant to settle Interroga- tories, Copy, and Service	0	5	6			
Attending thereon, Interrogatories allowed - - -	0	6	8			
Paid Master's Clerk engrossing In- terrogatories, fol. 22	0	7	2			
Parchment and Duty -	0	7	6			
Paid for Certificate	1	5	0			

FOR DISCHARGING A SOLICITOR. 833

	CHARGE.			TAX OFF.		
	£.	s.	d.	£.	s.	d.
Paid Master's Clerk for drawing and transcribing same -	0	14	6			
Gave Master's Clerk -	1	1	0			
Attending for the Certificate, and filing same -	0	6	8			
Paid filing, and for Office Copy	0	5	10			
March 14th. Warrant to bring in Examination, Copy and Service	0	5	6			
Attending thereon, and Mr. Shufflebottom undertook to bring in his Examination in a Week -	0	6	8			
Paid for Office Copy of Mr. Shufflebottom's Examination -	1	17	4			
Perusing and examining Examination, and attending Mr. Leycester to know if the Money admitted to have been received was correct	0	6	8			
Paid for Office Copy of Bill of Costs, fol. 220 -	5	10	0			
Paid for Office Copy of Draft of the Master's Report, fol. 20 -	0	10	0			
18th. Warrant on preparing Draft, Copy, and Service -	0	5	6			
20th. Warrant to settle Copy and Service -	0	5	6			
Attending settling same -	0	6	8			
23d. Warrant to sign Report, Copy, and Service -	0	5	6			
Attending thereon -	0	6	8			
Paid Master for Report -	1	5	0			
Paid Master's Clerk for drawing and transcribing, &c. -	0	15	6			
Gave Master's Clerk -	2	2	0			
Attending the Master for Report, and filing same -	0	6	8			
Paid filing Report -	0	15	10			
VOL. I.	3 H					

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Attending several Times to serve a Copy of the Report, and to demand the Balance reported due, and the Papers and Proceedings, but he was not within -	0	13	4	0	6	8
Drawing Notice that Mr. Shufflebottom might be ordered forthwith to pay the Balance reported due, and to deliver up the Papers, &c. Copy and Service, &c.	0	6	0	0	2	0
Instructions for special Affidavit in support of Motion -	0	6	8			
Drawing and ingrossing same, Duty and Oath - -	0	10	7			
Paid filing, and for Office Copy	0	9	6			
Drawing and ingrossing Affidavit of Service, Duty, &c. -	0	7	7	0	7	7
Paid filing and for Office Copy	0	6	7			
Instructions to Counsel to move for Payment of Balance -	0	13	4	0	3	4
Fee to Mr. Roupell and Clerk	1	3	6	0	2	6
Attending him therewith -	0	6	8			
Attending Court, Order made for Payment of the Balance, and for Delivery of the Papers, &c. in a Week, and that leaving a Copy of the Report, and of the Order with Mr. Shufflebottom's Clerk at his Chambers, should be good Service	0	13	4			
Attending Register to draw up, pass, and enter Order -	0	6	8			
Paid for Order and Entry	0	12	6			
Copy of the Master's Report to serve, fol. 20 -	0	10	0			
Copy and Service of the Order, and Report, as directed -	0	5	0			

FOR DISCHARGING A SOLICITOR. 835

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Drawing Notice that Mr. Shufflebottom might stand absolutely committed, for not paying the Balance, and Delivery of the Deeds, &c., Copy, and Service -	0	6	0	0	2	0
Drawing and engrossing Affidavit of Service of the Order and Report, and that the Balance was not paid, nor the Papers, &c. delivered, Duty and two Oaths -	0	12	7			
Paid filing and for Office-Copy	0	10	7			
Instructions to Counsel to move for Commitment -	0	6	8			
Fee to Mr. Roupell and Clerk	1	3	6	0	2	6
Attending and instructing him	0	6	8			
Attending Court and Order made for Commitment -	0	13	4			
Paid for Order and Entry	0	12	6			
Attending Mr. Shufflebottom, receiving from him the Balance, and the Papers and Proceedings, comparing same with the Schedule, and giving him Receipt	0	13	4			
Attending Register to draw up, pass, and enter Order -	0	6	8			
Term Fee, Clerk in Court, and Solicitor -	0	16	8	0	16	8
Letters and Messengers -	0	5	0	0	5	0

This being an *ex parte* Proceeding no Term Fee, and in strictness no Letters ought to be allowed, those Charges forming Part of the general Bill of Costs in the Cause.

BILL OF COSTS

*Where more than one-sixth of the Bill was taxed off, and the
Solicitor paid the Costs of Taxation.*

EASTER TERM, 1828.

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
INSTRUCTIONS to Counsel to move that it may be referred back to the Master to tax the Costs occasioned by taxing Mr. Shuffle- bottom's Bill, one-sixth Part having been taxed off -	0	6	8	0	4	2
Fee to Mr. Roupell to move	0	10	6			
Attending him, and Register to draw up and enter Order -	0	6	8			
Paid for Order and Entry	0	10	6			
Copy and Service upon Mr. Shuffle- bottom personally -	0	10	0			
Drawing and fair Copy, Bill of Costs, fol. 43 -	1	8	8			
Copy Order for the Master	0	14	4	0	14	4
April 26th. Warrant on leaving Bill of Costs, Copy, and Service	0	5	6			
— 28th. Warrant to tax, Copy and Service -	0	5	6			
Attending taxing, Clerk in Court and Solicitor -	0	13	4			
Paid for Report -	1	5	0			
Paid drawing and transcribing	0	14	6			
Attending for Report, and filing -	0	6	8			
Gave Master's Clerk -	1	1	0			
Paid filing Report -	0	5	10			
Attending receiving the Costs, and giving Receipt -	0	13	4	0	13	4
Term Fee, Clerk, and Solicitor	0	16	8	0	16	8
Letters and Messengers -	0	5	0	0	5	0

BILL OF COSTS

BETWEEN SOLICITOR AND CLIENT

Of taxing the former Solicitor's Bill, where the Client pays the Costs of Taxation, the Bill being taxed under a Sixth.

IN CHANCERY.

John Bostock,

PLAINTIFF,

AND

George Manwaring,

DEFENDANT.

MR. DELVES, DR.

HILARY VACATION, 1824.

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
DRAWING Notice that it may be referred back to Mr. Stratford to tax the Costs of taxing Mr. Willshire's Bill, and that Mr. Bullock might be ordered to pay such Costs when taxed, Copy and Service	0	4	6	0	4	6
Drawing and engrossing Affidavit in support thereof, and of the Service of the Notice, Duty, and Oath	0	8	1			
Paid filing, and for Office-Copy	0	6	10			
Instructions to Counsel to move	0	2	6			
Fee to Mr. Maddock to move	0	10	6			
Attending Court Order made	0	13	4			
Paid for Order and Entry	0	10	6			
Copy for the Master -	0	2	6	0	2	6
Drawing and fair Copy Bill of Costs pursuant to the Order, fol. 220	5	10	0	5	10	0
February 10th. Warrant on leaving, Copy, and Service -	0	4	6			
12th. Four Warrants to tax, Copy, and Service -	0	17	0			
Attending taxing, Clerk in Court, and Solicitor -	2	13	4	1	6	0

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Instructions for special Affidavit in support of Charges and Attendances, Fees paid to Counsel, and other Payments in the Cause	0	6	8	0	6	6
Drawing and engrossing, Duty and Oath (a) -	0	14	1			
Warrant on leaving, Copy, and Service	0	5	6			
Paid for Office-Copy of Interrogatories, fol. 30 -	0	13	4			
Attending Warrants settling Interrogatories -	0	6	8			
Instructions for Examination	0	13	4			
Drawing, and fair Copy Examination, fol. 20 -	1	10	0			
Attending him therewith -	0	6	8	0	6	8
Engrossing Examination	0	15	0			
Parchment and Duty -	0	7	6			
Attending swearing, and paid Oath	0	7	8			
Paid on leaving Examination	0	2	6			
Warrant on leaving Examination, Copy, and Service -	0	5	6			
Warrant to settle Queries, and cast up Bill of Costs, Copy, and Service	0	5	6			
Attending thereon, and casting up the Costs, &c. -	0	6	8			
Paid for Master's Certificate	1	5	0			
Paid transcribing Report, and Duty	0	14	0			
Gave Master's Clerk	2	2	0			
Paid filing -	0	5	10			
Attending for same, & attending filing	0	6	8			
Attending to receive the Costs, giving Receipt, and delivering up the Papers and Proceedings	0	6	8	0	6	8

(a) This must be filed at the Affidavit Office in point of regularity, if to be used in Court.

PRACTICAL OBSERVATIONS

AND

REMARKS.

IN the Prosecution of a Suit in Chancery, or in some Cases where there is no Cause in Court, the dilatory Conduct or Delinquency of the Solicitor, or a Variety of other Motives, may induce a Party to change his Solicitor, and to take Deeds, Writings, Papers, and Proceedings out of his Hands; if this can be done amicably, it is more advisable to pass over some Charges in the Bill of Fees and Disbursements apparently extravagant, than to proceed to a Taxation adversely. But if it becomes absolutely necessary to have recourse to compulsory Measures, the Party must resort to the *general Jurisdiction* which the Court possesses over Solicitors as Officers of the Court, or to the *statutory Jurisdiction* which it derives from the Acts of the Legislature, and which are considered as introductory only of Regulations (a) of the Jurisdiction which the Court has exercised for a Period of Time, the Origin of which is not to be ascertained.

It may be proper in this Place to observe, that a distinguished Author speaking of Costs at Law, lays it down, that before an Attorney's Bill has been settled and paid, it may be taxed, as a *matter of course*, at any Distance of Time, the Statute prescribing no particular Period for its Taxation (b); but, says the learned Baron, where it has been settled and paid, and the Payment has been long acquiesced in, and repeated Opportunities to tax have been neglected, the Court will not, as of course, direct a Taxation. Where Costs

(a) 11 Ves. 238. 13 Ves. 124. Tidd. Costs, 76. Beam. Costs.

(b) Hullock's Costs, 507. 277.

have been taxed and paid, under a Decree, Lord Eldon held it not of course, to order a re-Taxation (*a*) ; and it seems to be settled by Lord Hardwicke as a general Doctrine, that if a Bond or Security has been given or entered into by the Client to the Solicitor, during the Pendency of the Cause or Proceeding, the Security will be set aside entirely, or at any rate be restricted in its operation to the Amount of such Fees, as may be found due to the Solicitor, upon a regular Taxation of his Bill, and the Bill of Fees, if insisted on, *must be taxed* (*b*) ; and so a Settlement of a Bill of Costs pending the Suit, while the Client has no professional Adviser, except the Solicitor himself, has been held not a Bar to the Taxation (*c*).

And the same noble and learned Judge, upon an Application in 1807, to tax a Bill delivered in 1803, after an Action brought, and the Client taken in Execution, held that if a Bill of Costs has been settled and paid, and the Payment has been acquiesced in, the Court will not refer the Bill to be taxed, *as a matter of course* : that the general Rule is, that an Attorney's Bill which has been delivered for the Purpose of creating a Capacity of bringing an Action, cannot be taxed at the Trial, or after Verdict (*d*) ; but that under *special Circumstances*, the Court will refer it to be taxed, if it be shewn by Affidavit, that the Business *has not been done*, or that the Charges are *fraudulent* ; that neither Payment of the Money, nor a Release, nor a Judgment for the Demand, nor a Bond, will preclude Taxation in such a Case ; neither will a Warrant of Attorney to confess Judgment ; that it is extremely proper, that the Principle upon which the Court acts should be understood : ample Protection must be given to the Client ; but on the other Hand, Protection is also due to the

(*a*) 1 Anstr. 186. 2 Hull.

507. Beam. Costs. 278. notis.

(*b*) 2 Atk. 298. Forrest. 115.

4 Br. C. C. 350. 7 Ves. 584.

3 Anstr. 769.

(*c*) 1 Ja. and Wa. 460.

(*d*) 1 Dougl. 198. 2 Bos.

and Pul. 237. 2 Phill. 117.

14 Ves. 262.

Officer of the Court (a). Where the Charges in a Solicitor's Bill appeared *prima facie* exorbitant, it was ordered to be taxed after Payment made, and even after the Death of the Assignee who paid it (b). If, however, as Lord Ellenborough has observed, it should be shewn upon the Application to be a *manufactured* Bill, that would be a very strong auxiliary Circumstance in favour of the Application (c).

And upon a Motion to dissolve an Injunction, restraining a Solicitor from proceeding upon Bonds given while the Business was depending, Lord Eldon laid it down as the Principle upon which the Court acts; that generally, if an Attorney has received a Security, the Court will, as frequently has been done, after actual Payment, order a Taxation of the Bill, and supposing the Rule not to be so *generally*, yet where the Security has been received not after the whole Business was concluded, but while the Suit was going on, the Bill *must be taxed*: that the Court may order Taxation, as Lord Camden (d) did after eight Years, and Lord Hardwicke (e) after twenty-one, and an actual Security given: where the Court can see that it was obtained by the undue *Pressure* of that *Influence* which the Situation of an Attorney gave; permitting the Security to stand only for what is justly due: that his Lordship would go much further; for that after *Security given*, and *even Payment*, if the Client can point out in the Bill *gross Errors, Charges amounting to Imposition and Fraud*, the Court will open the whole Bill (f).

The Courts of Law have determined, that after an Attorney's Bill has been taxed by the proper Officer of the Court, wherein the Business was done, that it cannot be taxed a second Time by the Officer of any other Court (g). In *Harvey v. Burt*, the Taxation of the Bills of Costs was

(a) 14 Ves. 262. 2 Atk. 25, 295.

(b) 1 Buck. 11.

(c) Campb. N. P.

(d) Dick. Rep. 103.

(e) 2 Atk. 19. 2 Atk. 295.

(f) 1 Ves. and Bea. 126.

(g) 2 Barn. 122. Hull.

Costs, 514.

opened by Lord Thurlow, at the Instance of Sir William Pepys, and reduced from 4300*l.* to 900*l.*

The Client may discharge his Solicitor without a previous Order of Court (*a*): but a Solicitor *declining* to proceed, can claim no *Lien* upon a Fund in Court, *if he does not carry the Cause on to a Hearing*; and it is laid down in a Work of Merit, in conformity with a *dictum in siderfin*, that where an Attorney once appears, or undertakes to be Attorney for another, he shall not be permitted to withdraw himself (*b*). In *Creswell v. Byron*, Lord Eldon observed, that the Court of Common Pleas held, that an Attorney having quitted his Client before Trial, could not bring an Action for his Bill (*c*); and the Court of King's Bench have held, that it is incumbent upon an Attorney to proceed in a Suit commenced upon the Credit of a Client, although the Client should not furnish him with Money, and therefore, if on that Account he neglects to proceed according to the Practice of the Court, whereby Judgment of *non pros* is signed against the Plaintiff, the Court will make a Rule upon the Attorney to pay the Costs of such Judgment, together with the Costs of the Application (*d*): and Lord Eldon held that a Solicitor going a certain Length in a Cause, shall not leave it there, but shall go on (*e*). A Solicitor having Possession of the Papers, and refusing to proceed, must allow the new Solicitor to see them, and must himself attend with them before the Master, or allow the new Solicitor to have them for that Purpose, whatever Lien he may claim for Costs (*f*); but the *Party changing* his Solicitor does not affect the *Lien* for his Costs; the Papers cannot be taken out of his Hands without paying his Bill: but the Solicitor cannot stop the Progress of the Suit otherwise than by retaining the Papers.

(*a*) 13 Ves. 161, 195.

(*b*) 1 Tidd Pr. 112. 1 Sid. 31.

(*c*) 14 Ves. 272, 273.

(*d*) Say. Rep. 172. Hull.

Costs, 489.

(*e*) 14 Ves. 196.

(*f*) 1 Swanst. 1.

There is no Case, says Lord Eldon, where a Solicitor who has received Papers from his Client in a Cause, has been suffered *to refuse the Production* of them in that Cause; but, continues his Lordship, though he cannot refuse to produce them, he may refuse *to part with them*, or to produce them in *any other Matter* (a); and where a Defendant's Clerk in Court had impounded the Record of the Bill and Office-Copy till paid for, his Lordship prefaced the Order for Production of the Office-Copy to be marked by the Six Clerk, by observing, that a Clerk in Court or Solicitor having engaged in a Cause, and refused to proceed without Payment of his Fees, cannot *stop the Cause*; he may decline acting until paid, and not be compelled to part with the Papers, but he must not *delay the Progress of the Suit*; and the Refusal authorizes the Client to employ another Clerk in Court or Solicitor; and although he cannot be compelled to part with them, he must produce them for all Purposes in the Cause; and his Lordship expressed his Disapprobation of the Refusal by visiting the Clerk in Court with the Costs of the Application (b); and a Solicitor has been ordered to produce the original Will of his Client, for the Purpose of establishing the Character of all Persons claiming under it (c). Applications by Solicitors to restrain a Party from proceeding in a Cause, until the former Solicitor's Bill of Fees has been paid, have been refused: so Objections to a Plaintiff being heard, who had appeared by a new Solicitor, the former Solicitor not having been applied to for Delivery of the Papers, and no Offer made to pay his Costs (d).

By a Statute passed early in the Reign of James the First (e), "Attornies and Solicitors must deliver a true Bill unto their Masters or Clients, or their Assigns, of all Charges concerning the Suits which they have for them, subscribed with their Hands and Names, before they shall

(a) 1 Ves. and Beam. 350.

(d) 13 Ves. 161, 195.

(b) 3 Swanst. 93.

(e) 3 Ja. 1. c. 7. s. 1.

(c) 18 Ves. 294.

charge their Clients with any Fees or Charges.” The Provisions of this Statute being found ineffectual, by a legislative Provision, 2 Geo. 2. c. 23. s. 23, “ It is enacted that no Attorney or Solicitor shall commence any Action for the Recovery of any Fees, Charges, or Disbursements, at Law or in Equity, until the Expiration of one Month or more after such Attorney or Solicitor shall have delivered unto the Party or Parties to be charged therewith, or left with him, or her, or them, at their *Dwelling House, or last Place of Abode*, a Bill of such Fees, Charges, and Disbursements, subscribed with the proper Hand of such Attorney or Solicitor respectively; and upon Application of the Party or Parties chargeable by such Bill, or of any other Person, in that behalf authorized to the Lord Chancellor, the Master of the Rolls, the Court of Exchequer, or to any of the Courts in the said Act mentioned, or to a Judge or Baron of the Court in which the Business contained in such Bill, or the greatest Part thereof in Amount or Value, shall have been transacted; and upon the Submission of the Party or Parties, or such other Person authorized, to pay the whole Sum, of what upon Taxation of the said Bill shall appear to be due, it shall be lawful for the said Lord High Chancellor, &c. to refer the said Bill, (although no Action or Suit be depending in such Court touching the same) to be taxed and settled by the proper Officer of such Court, without any Money being brought into Court; and if the Attorney, Solicitor, or Party chargeable with the Bill, having due Notice, shall refuse or neglect to attend such Taxation, the said Officer may proceed to tax the said Bill *ex parte*, pending which Reference and Taxation no Action shall be commenced or prosecuted touching the said Demand.

“ And upon the Taxation and Settlement of such Bill and Demand, the Party or Parties shall forthwith pay to the said Attorney, or Solicitor, or to any Person by him authorized to receive the same, that shall be present at the said Taxation, or unto such other Person or Persons, or in such

manner as the respective Courts aforesaid shall direct, the whole Sum that shall be found to be, or remain due thereon, which Payment shall be a full Discharge of the said Bill and Demand; and in Default thereof, the Party shall be liable to an Attachment, or Process of Contempt, or to such other Proceedings at the Election of the said Attorney or Solicitor, as such Party or Parties was or were before liable unto.

“ And if upon the said Taxation and Settlement, it shall be found that such Attorney or Solicitor shall happen to have been overpaid, then in such Case the Attorney or Solicitor shall refund and pay unto the Party or Parties entitled thereto, or to any Person authorized by him to receive the same if present at the settling thereof, or otherwise unto such other Person, or in such Manner, as the respective Court shall direct, all such Money as the said Officer shall certify to have been so overpaid; and in Default thereof, the said Attorney or Solicitor shall in like Manner be liable to an Attachment, or to such other Proceedings at the Election of the Party, as he would have been subject to if the said Act had not been made.

“ And the said respective Courts are hereby authorized to award the Costs of such Taxation to be paid by the Parties according to the Event of the Taxation of the Bill, that is to say, if the Bill taxed be less by a sixth Part than the Bill delivered, then the Attorney, or Solicitor, is to pay the Costs of the Taxation; but if it shall not be less, the Court, *in their Discretion*, shall charge the Attorney or Client in regard to the *reasonableness* or *unreasonableness* of such Bill.”

And by the sixth Section of the said Act, any Clause, Matter, or Thing, therein contained, shall not extend to any Bill of Fees, Charges and Disbursements due from any Attorney or Solicitor, or Clerk in Court, to any other Attorney or Solicitor, or Clerk in Court, but every such Solicitor, Attorney, or Clerk in Court, may use such Remedies for recovery of his Fees, Charges, and Disbursements, against

such other Attorney or Solicitor as he might have done before the making of the said Act.

Lord Eldon, in deciding upon a summary Application by Petition, under the general Jurisdiction of the Court of Chancery over its Officers, (there being no Cause) to take Title Deeds out of the Hands of a *Solicitor*, offering to pay his Demand, and praying a Delivery of his Bill of Fees, &c. ; observed, there was no Doubt but that the Court exercised *this Jurisdiction long before* the Statute of the 2d Geo. 2, which did little more than introduce the *Regulations* under which the Jurisdiction should be exercised : and adverting to the Decisions of the Courts of Law (*a*), upon summary Applications against the Officers of the respective Courts, was satisfied that the Application might be made, and granted the Order (*b*).

The Court of King's Bench has exercised a summary Jurisdiction over an *Attorney* of that Court, and obliged him to deliver up Court Rolls, Title Deeds, Papers and Writings, on Satisfaction of his Lien, although they came into his Hands as Steward of a Manor, and the Receiver of the Rents (*c*) : and if a third Person be interested in the Deeds, the Court will not suffer the Attorney to avail himself of that Circumstance, but will direct a Security to be given by the Person to whom they are delivered, to produce them on Demand for Inspection. And the Court of Common Pleas, by a summary Proceeding at the Instance of the Lord of a Manor, has taken the Title Deeds of the Manor, and the Court Rolls out of the Hands of a Steward, *an Attorney* of the Court (*d*).

But in the Exercise of this wholesome Severity, it seems to be an indispensable Requisite, that the Deeds, &c. should have come into the Hands of the Officer in the *Character of Attorney*. A Court of Law has refused to

(*a*) 3 Term Rep. 275. Stra.
621. 8 Mod. 339.

(*b*) 6 Ves. 425. 5 Ves. 706.
13 Ves. 124.

(*c*) 3 Term Rep. 275.
(*d*) 5 Taunt. 206.

proceed *summarily* against a Steward who was an Attorney, to compel him *to account* before the Master for Receipts and Payments, in respect of mortgaged Premises, and to pay the Balance to his Employer, and to deliver up Title Deeds, Papers, and Writings, relating to the Estate: this being the proper Subject of a Bill in Equity; and not a Case for a *Mandamus* to compel a Steward of a Manor to deliver up Court Rolls, in lieu of which this summary Proceeding has been adopted, where the Steward of the Court is *an Attorney*; the Application not *regarding his Duty as an Attorney* (a). And a Court of Law has refused to compel an Attorney by a summary Rule, to deliver up on Payment of his Bill, a Lease put into his Hands for the Purpose of making an Assignment of it; which if improperly detained, would be the Subject Matter of a Bill in Equity, or of an Action at Law, there being no Cause in Court, nor any Imputation against him of criminal Conduct in *his Character of an Attorney* (b). So where an Attorney held a Deed as *Party and Trustee*, a Court of Law has refused to make an Order upon him to deliver up the Deed (c). But it seems to be now settled, that where Deeds, Writings, &c. come into an Attorney's Possession *in the Way of his Business, and in the Character of Attorney*, the Courts of Law and Equity will in a summary Manner compel him to deliver them back to the Party upon Payment of what is due: but when they come into his Hands in any other Manner, or on any other Account, than in his Way of Business, and Character of Attorney, the Party must resort to his Action at Law, or Suit in Equity (d). Where an Action had been commenced in the Court of King's Bench upon an Attorney's Bill, that Court, being thereby possessed of the Cause, has a Power to refer such Bill for Taxation,

(a) 6 East's Rep. 404. 2

(c) 5 Taunt. 364.

Smith's Rep. 409.

(d) 1 Salk. 87. Say. Rep.

(b) 8 East's Rep. 237.

125. 8 Mod. 306.

although no one Item in it be for Business done in that Court (*a*).

Lord Hardwicke is said to have held *Agency* Business not within the *Act of Parliament*, and that his Lordship on that Ground discharged an Order obtained by a Country Solicitor for taxing a *Town Agent's* Bill of Fees (*b*). And it has been decided, that a Solicitor's Bill of Fees for Proceedings before the Lord Chancellor in the exercise of a Visitorial Power under a Royal Foundation, not being Proceedings in Law or Equity, or in the Exercise of his Equitable Jurisdiction, is not within the Statute (*c*). So a Bill of Costs for soliciting an Act of Parliament, which Lord Eldon has observed any one might do, if it relates solely to obtaining the Act; although done by a Solicitor, is not taxable (*d*). And a Bill will not be taxed by a Court of Equity for Business done solely in the House of Lords, though under the Recognizance the Effect has been obtained (*e*); the Costs of an Application to the King in Council, for a Reference to the Lord Chancellor to report his Opinion; as in the Instance of an Application for a Commission of Review of the Sentence of a Court of Delegates, there being no Cause, and the original Application being to the King, are not within the Statute (*f*). And so the Costs of Proceedings in a Cause in the Court of *Great Session in Wales*, where *nothing beyond the Costs* is in dispute, are not taxable (*g*). And the Statute has been held not to apply to a Case where a Party by Agreement has paid the Bill of another Person, and consequently such Party cannot apply for a Taxation (*h*); the Court has no Jurisdiction to order a Solicitor's Bill to be taxed, on the Application of the Solicitor himself (*i*).

(*a*) 2 Barnard. K. B. 182.

(*b*) Dick. 112. quæ.

(*c*) Ves. 547. 2 Hull. 507.

(*d*) 3 Ves. & Bea. 21.

(*e*) Ibid.

(*f*) 5 Ves. 633.

(*g*) 2 Meri. 500.

(*h*) 1 Ja. & Wa. 291.

(*i*) 1 Sim. & Stu. 97.

An Order for taxing a Bill of Costs, entitled in the Cause, if obtained by a Party to the Cause has been held regular, under the *general Jurisdiction*; but a Person not a Party must apply *ex parte* under the Statute 2 Geo. 2; and an Irregularity in this respect would be waived by Proceeding under the Order. But it has been made a Question, whether a Party having obtained such Irregular Order in a Cause, can pursue it under the Statute (a).

If the *whole Bill* be for Conveyancing, it cannot be referred for Taxation: in such Case the Solicitor must recover upon a *quantum Meruit*, but the *Items* of it will be open to Examination and Discussion at *Nisi Prius*, and the Plaintiff must, besides proving the Performance of the Business, and his Retainer, shew at the Trial that the Charges are reasonable; but if there be one single *Item* in the Bill which is a Proceeding in a Court, the Charges for Conveyancing fall within the Statute (b). An *Obitur Dictum* of the Court of Common Pleas, that *where an Attorney was employed*, the Court of King's Bench had held that they might refer a Bill for Taxation, though it contained *no Law Articles* (c), seems to indicate a strong Disposition at some future Period to subject a Bill for Conveyancing to Taxation by the Master.

If the Bill includes Parliamentary Business, or Fees paid for Business in the Ecclesiastical Courts, or for Business at the Quarter Sessions, or for levying Fines and Recoveries, or for Fees and Disbursements in Causes; the whole Bill is Subject to Taxation (d). So where a Solicitor has delivered separate Bills, one for Conveyancing, and the other for Fees and Disbursements in Causes, both must be taxed, they form *one Bill* (e). For Lord Eldon observed in a Court of Law, that the Expences of Conveyancing, as such, are not

(a) 11 Ves. 328.

(d) Tidd's Costs, 75. 3

(b) Tidd's Costs, 74. Bull. Doug. Rep. 199. n. 4 Term
Ca. 145. 3 Bro. C. C. 233. Rep. 124.

(c) 1 N. R. 266.

(e) 2 Hall. 502. Sayer
256. Tidd's Costs. 74.

taxable, they are not to be considered as “ Fees, Charges, or Disbursements,” at Law or in Equity ; but if one single Item which may be so considered, is to be found in the Bill, the Charges for Conveyancing fall within the Statute ; on the Principle that what is paid for Conveyancing is paid in the Character, and in the Exercise of the Duties of an Attorney ; and a Person shall not be allowed to split his Demand, for the Statute attaches upon the whole Demand which he has in that Character ; and, that this Rule would hold, though some of the Items were wholly unconnected with the Attorney’s professional Capacity (*a*). It should seem, however, that if *no Bill be delivered*, a Solicitor would be entitled to recover Items charged in Respect of Payments for the Client’s Use, not referable to the Business of a Solicitor, although a Bill of Particulars by a Judge’s Order contained other Items which might be taxable under the Statute (*b*).

The Courts of Law have held, “ that Charges for taking Instructions to commence Action, drawing and ingrossing Affidavit of Debt, and attending to get it sworn and paid Oath,” were to be considered as Charges for Business done in Court (*c*). Charges for holding the Court Leet of a Manor by the Steward, an Attorney, are Charges for Business connected with his professional Character, and therefore like Conveyancing Charges, taxable when found in a Bill containing any taxable Items (*d*), a *Dedimus potestatem* charged in an Attorney’s Bill, was held a sufficient *Item* to enable the Court of Common Pleas to refer a Bill for taxation, though with this exception it was entirely for Conveyancing (*e*) ; and an *Item* for preparing a Warrant of Attorney to confess Judgment, although it had not been executed, sufficient to render the whole Bill

(*a*) 2 B. and P. 343. 1
Camp. N. P. 437.

(*b*) 11 East’s Rep. 285.

(*c*) 6 T. R. 645.

(*d*) 5 Ba. & Al. 896. 5 B.
& A. 49. 6 Taunt. 105.

(*e*) 1 N. R. 266.

liable to Taxation (a). The Court will refer a Bill to be taxed, although *all* the Business be done at the *Quarter Sessions* (b); and a Bill for obtaining a Bankrupt's Certificate, the obtaining the Lord Chancellor's Signature, is Business done in Court and taxable (c); so a Bill of Costs, by a Solicitor under a Commission of Bankrupt, though taxed by the Commissioners, and stated and allowed in the Account by the Assignees, has been held to be taxable under the 5 Geo. 2, c. 30 (d). A Solicitor's Bill for striking a Docket, and a Journey to get an Affidavit of Debt, being Business relating to the Bankruptcy, though previous thereto, has been ordered to be taxed (e). And it should seem that where the Solicitor has Deeds in his Possession, delivered to him for the Purpose of suffering Recoveries in the Great Sessions in Wales, and drawing Deeds; the having *Deeds in his Possession*, has been considered by Lord Eldon as affording an original Jurisdiction out of which the Order for Taxation flows, as consequential; and, that the Court having clearly Jurisdiction to order the Delivery of the Deeds and Papers, to do Justice between the Parties, it is necessary that any Lien the Solicitor may have for Costs should be first discharged; to ascertain the Amount of which, the Taxation is requisite, so that the Taxation is consequent upon the Order for Delivery, and upon these Grounds his Lordship made an Order for Taxation and Delivery of the Deeds (f); and where an Attorney had been employed to collect in the Effects of an Intestate, but not in any Cause or Suit in Law or Equity, and had got in and received considerable Sums, upon an Application to compel an Account and Taxation of Bill, and Delivery of Deeds and Papers; if, says Lord Chief Justice Abbott, in making the Rule absolute, an Attorney is employed in a Matter wholly unconnected with his profes-

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| (a) 2 Stark. N. P. 538. 3 | (d) 1 Meri. 32. 3 V. & B. 141. |
| B. & Al. 486: 4 Camp. 68. | (e) 5 Ves. 706. |
| (b) 4 T. R. 496. | (f) 6 Ves. 425. 2 Meri. |
| (c) 2 Taunt. 321. | 501. Beam. Costs. 273. |

sional Character, the Court will not interfere in a summary Way to compel him to execute faithfully the Trust reposed in him: but where the Employment is so connected with his professional Character, as to afford a Presumption that his Character formed the Ground of his Employment by the Client, there the Court will exercise this Jurisdiction. And, continues his Lordship, the Case where the Court compelled the Attorney to deliver over Deeds, placed in his Hands for the Purpose of making a Conveyance, proceeded upon this Ground; for as a Conveyance requires Knowledge of Law, the Trust is reposed by the Client in the Party, in respect of his being an Attorney (*a*).

A Bill of Fees, Charges, and Disbursements, if any Part of it be for Business done in Court (*b*), though some of the *Items* may be for Matters not taxable (*c*), is required by the Statutes to be written in a legible Hand, with such Abbreviations as are commonly used, except Law Terms, and Names of Writs in Words at length, with an Exception as to Times and Sums (*d*); but a Mistake in the Date of the Items, if it does not mislead, has been held not to vitiate the Delivery of the Bill (*e*). It may be useful to observe that a Bill of Fees spun out to an extravagant Length, may be referred for Impertinence, or Scandal, if it be made the Vehicle of Abuse (*f*): the Bill must be subscribed with the proper Hand-writing of the Attorney or Solicitor (*g*); and the Bill thus signed must be delivered to the Party or Parties, to be charged therewith, or *left at his or their Dwelling House, or last Place of Abode*, at least a complete lunar Month (*h*) before any Proceedings can be taken for the Recovery thereof; if the Bill is delivered to the Client himself, it must be left with him, and not taken

(*a*) Ba. and Al. 47.

(*b*) 5 T. R. 694.

(*c*) 6 T. R. 645.

(*d*) 12 Geo. 2. c. 13. 4
Taunt. 163.

(*e*) 4 Taunt. 806.

(*f*) Ant. pa. 778.

(*g*) 2 Geo. 2. c. 23.

(*h*) 5 Esp. N. P. 168. 2
Phill. Ev. 115.

back again, though he should acknowledge the Debt, and promise to pay; the Statute, which has been construed liberally in Favour of the Client intending that he should have due Time to examine and advise upon the Charges (*a*): nor would it be sufficient to prove that a Copy of the Bill was shewn to the Client, and the several Charges explained, upon which he admitted the Debt (*b*); for the Words of the Statute are *imperative*. If the Attorney's Clerk who delivered it be dead, an Indorsement thereof in his Hand-writing, would be sufficient Evidence of the Delivery (*c*); if the Delivery is not to the Party, it must be left for him *at his Dwelling House or last Place of Abode*, shewn by Evidence to have been the only *known abode of the Party* at the Time of the Delivery (*d*); leaving at his Counting-house, is not sufficient (*e*), but *personal* Service not being indispensably necessary, a Delivery of the Bill to an Agent appointed to receive it (*f*), or to a Person appointed Attorney in the Place of the former Attorney discharged, has been held a Delivery within the Statute (*g*). Where several are jointly liable, and one is authorized to act for the others, Delivery of the Bill to him who gave the Instructions will be sufficient as against the Rest (*h*): or if they all jointly employ the same Attorney, and act together in the Business, Delivery to any one in an Action against the others will be sufficient (*i*); but it should be observed, though they may be jointly liable, a Delivery to one who took no Part in the Business, would not be regular as against the others (*k*). And the Statute has been held to extend to an Agreement between the Attorney and Client, that the former should charge nothing more than the Money actually laid out in Respect of Law Business; and that an Action could not be main-

(*a*) 1 H. Bl. 290.

(*b*) 1 Campb. 437.

(*c*) 1 Stark. N. P. 40. 4.

(*d*) 1 Stark. N. P. 321.

(*e*) 2 Bos. & Pul. 343.

(*f*) 2 Campb. 277.

(*g*) 12 East, 372, 378.

(*h*) 2 Camp. 277.

(*i*) 1 Campb. 437.

(*k*) 2 Campb. 277.

tained for the Amount, unless a Bill be previously delivered (*a*). So if there be an Agreement that the Attorney should be paid for his Time at a certain Rate by the Day, besides his Expences (*b*); but if he agree to accept, in Satisfaction of a Bill delivered, a less Sum than its Amount, the Attorney will not be charged with the Costs of Taxation, unless a sixth Part of the Sum so received be deducted (*c*).

The Course of Practice before the Statute, upon Application to tax a Solicitor's Bill, was to order the whole Demand to be brought into Court; the Bill is now ordered to be taxed, upon the Party's *submitting to pay* what shall be found due. (*d*)

To proceed adversely to enforce the Delivery of a Bill of Fees, &c., an Order must be obtained by Motion, as of Course, or by a Petition to the Master of the Rolls: for the former Purpose an Application may be made any Day in Term, or on the Seal Days before or after Term, by giving Instructions to Counsel, with the Title of the Cause, to move that the Party's former Solicitor may within a Week, deliver to the Party applying, a Bill of Fees, &c., in the Cause, and all other Matters, with the usual Directions, the Motion Paper signed by Counsel, must be left with the Register, and the Order thereon drawn up, passed and entered; or if the Application be by Petition to the Master of the Rolls, (which is the more expeditious Course,) a Petition (*see Petitions*) must be properly engrossed, and left at the Secretary's Office, in the Rolls-yard, and when answered (usually the next Day) a Fee of 5s. 6d. must be paid to the Secretary, and the Petition must be taken to Mr. Bird, at the Register Office, and the Order drawn up and passed by him, the Order so passed, must be left with the proper entering Clerk, at the same Office,

(*a*) Peake, Ca. 102.

(*c*) 2 Hull, 516.

(*b*) Tidd's Costs. 77. Saye,
321.

(*d*) 2 Ves. 451. Prac. Reg.
Wy. Ed. 398.

and when entered the Order is complete. If the former Solicitor has misconducted the Business, or been guilty of any Irregularity, the Petition may be framed, so as to serve the two-fold Purpose of an Investigation of the Irregularity complained of; and the Delivery and Taxation of the Bill of Costs as incidental, but for this Purpose, the Petition must state the special Matter of Complaint, and pray consequential Direction, and be supported by Affidavit and set down for Hearing, and brought on as a Cause Petition (a).

To make this Order effective, a Writ of Execution of the Order cannot be regularly issued, the Solicitor not being a Party to the Suit. (b) A Copy, therefore, of the Order, must be made and served upon the Solicitor *personally*, by leaving the Copy, and shewing the original Order, passed and entered at the Time of Service. If the Solicitor cannot be served *personally*, after every Endeavour has been used, an Application must be made to the Court, by giving Instructions to Counsel, to move, "that Service of the Order upon the Solicitor's Clerk, at his Chambers (where he carries on Business,) or at his Dwelling-house or Place of Abode, with one of the Family, may be good Service." An Affidavit of the Means which have been used to serve the Order, must be made, and filed at the Affidavit Office, Symond's Inn, and an Office Copy taken to read when the Motion comes on; and *ex abundanti*, a Notice of Motion may not be improper, the Service of which upon the Solicitor's Clerk, or at his House, may be included in the Affidavit in Support of the Motion. The Court will, upon this Motion, substitute a Service, by leaving a Copy as prayed by the Motion. This Motion must be attended for the Purpose of reading the Affidavit and giving any Explanation the Court may require. The Counsel's Brief must be left with the Register, who attended the Court, and the Order drawn up, passed, and entered, at the same Office as before directed. A Copy of this Order, and of the former

(a) Walsh v. Brear, 17 (b) 14 Ves. 207. Anon.

April, 1818. M.S.

Order, must be served upon the Solicitor's Clerk at his Chambers or elsewhere, as directed by the Order, by leaving separate Copies of the several Orders, and shewing the Orders, respectively passed and entered, at the Time of Service. If the Bill of Fees and Disbursements be not delivered, as directed by the Order, after the Expiration of the Time limited for Delivery of the Bill ; another Application must be made by Motion, and a Notice of such Motion served as the Orders were, and an Affidavit made of the Service of the two Orders, and of the Notice ; and that the Bill of Fees, &c. has not been delivered as by the Order was directed, must be made and filed in Support of the Application ; and Counsel must be instructed to move, that the Solicitor may stand committed to the Custody of the Serjeant at Arms, for Disobedience of the Order, for delivering a Bill of Fees, &c. : upon this Motion, the Court usually makes an Order that the Solicitor delivers his Bill of Fees, &c. in four Days or a Week, and in default that he stand committed, &c. and that Service of the Order upon the Solicitor's Clerk, at his Chambers, should be good Service. This Order must be drawn up, passed, and entered at the Register Office, as before directed, and served as before mentioned. If the Solicitor, after Service, persist in not delivering a Bill of Fees and Disbursements, a further Application must be made by Motion upon Notice, supported by an Affidavit made and filed of the Service of the last Order, and that the Solicitor hath in Contempt and Disobedience thereof, not delivered his Bill of Fees, &c. as by the Order directed ; that the Solicitor may stand absolutely committed, which the Court will order.

This Order must be drawn up, passed, and entered, in like manner, at the Register Office ; and must be delivered to the Serjeant at Arms attending the Court, or his Deputy ; in general the Serjeant at Arms draws up, passes, and enters the Order, and applies to the Solicitor for Instructions to apprehend the Party, and will take the necessary Means for enforcing Obedience to the Order. And if

the Party be taken, he must be brought to the Bar of the Court in Custody, and if he persists in his Contempt, the Court will commit him to the Fleet Prison, from whence he will not be discharged but upon Obedience to the Directions of the Order, and Payment of the Costs of Contempt.

A Bill of Fees, &c. delivered under this Order, must be signed by the Solicitor, and include all Business done for the Petitioner, at Law or in Equity, at the Sessions, in Doctors Commons, the preparing Conveyances, and all Law Business whatever.

If the Charges in the Bill delivered appear reasonable, and all the Business has been actually done, and the Money received, correctly accounted for, the Client would act prudently in giving his Solicitor Instructions to pay the Bill upon Delivery of the Papers and Proceedings: for if after the Delivery of the Bill, any unreasonable Delay should be incurred by the Petitioner, or he should obstinately refuse to proceed under the Order, the Solicitor would be at Liberty to proceed for the Recovery of his Bill either at Law, or by acting upon the Order, and leaving his Bill at the Master's Office, and taking out Warrants on leaving, and proceeding to tax the Bill as the Petitioner might have done; taking a Report and pursuing the usual Course for enforcing Payment of the Sum reported due; but as the Order directs that all Proceedings at Law for Recovery of the Bill of Fees be stayed, it would be proper to move to discharge the Order, or to obtain Leave to proceed at Law for Recovery of the Amount of the Bill. But such a Case seldom, if ever, occurs. The Petitioner in general proceeds under the Order, and for this Purpose the Order and the Bill of Fees and Disbursements, delivered by the Solicitor, must be taken to the Master's Office, to whom the Reference is made, an Office-Copy of which must be taken by the Solicitor taxing the Bill: a Warrant "on leaving the Bill of Costs," must be taken out, and a Copy served upon the Solicitor, or upon his Clerk at his Chambers, or his House for carrying on Business; and when that is returnable, successive Warrants must be taken out "to tax the Bill of

Costs," and served in like Manner, and the Petitioner's Solicitor, and if necessary, his Clerk in Court, must attend the Warrant. If the adverse Party do not attend this, which is the second Warrant, a third Warrant must be taken out and served as before, and attended by the Solicitor and Clerk in Court; and if there be no Attendance on on the other Side, the Master, upon Oath of the Service of three Warrants, will proceed *ex parte* and tax the Bill; sometimes the Master will not proceed *ex parte*, unless three Warrants to tax, exclusive of the Warrant on leaving have been taken out; and this seems the more regular Practice, although some Delay is occasioned. But if Expedition be required, an Order may be obtained that the Master may proceed *de die in diem*: this seems to have been done formerly without an Order; the Practice is now settled, that an Order is necessary, which may be obtained as of course, upon a very slight Suggestion (a), but it is not imperative upon the Master, he may use his own Discretion thereon. The Master will in most Cases proceed *de die in diem*, if the Parties will consent, and the Business in his Office is not interrupted. Warrants must be successively taken out and served, and attended until the whole Bill is gone through. The Order for Taxation is imperative upon the Master, and the Course of the Court restricts the Taxation to his Office; but lately an irregular Practice has prevailed of clandestinely withdrawing the Taxation from the Master's Office to the Chancery Office, and to other Places, and under Colour of Taxation submitting one or two trifling Queries in the Bill to the Master's Discussion, which has to a great Degree defeated the Directions of the Court. A more shameful Abuse does not exist, nor one more calling for Reprehension and Correction. If an Objection to attend, after the last Seal, or to issue Warrants, an Application must be to the Court for an Order to proceed, or in pressing Cases to transfer the Taxation to the Vacation Master (b). The Office Copies of the Bill, Answer, and Depositions must be produced,

(a) 11 Ves. 362.

(b) Corbin v. Birch, Trin. 1785. M.S.

signed by the Six Clerk, otherwise in strict Taxation they will be disallowed; at the Hearing they would be rejected and not allowed to be read in Evidence (*a*). The Queries in the Bill, if any have been made, must be disposed of before the Master can make his Report: in many Cases an Affidavit is required to prove Payment of the Fees and Disbursements in the Cause, and to support the Attendances charged in the Bill; and although the latter are sometimes no farther questioned, if supported by the Solicitor's Day Book, which may appear to have been regularly kept, and the Attendances entered in due Order, yet Cases have occurred, where it has been found necessary that the Book, so far as relates to the Attendances, and perhaps the Fees and Money therein charged, should be verified by the Affidavit of the Solicitor producing it. An Office-Copy of the Affidavit in Support of the queried Items, should be taken from the Master's Office, to see if the Affidavit be full to the Points deposed unto. Office-Copies of Pleadings should be marked by the Master as produced, and where one Solicitor is retained for a Set of Defendants, many in Number, Attention should be given to that Circumstance. Instances could be produced of a Solicitor bringing in separate Bills of Costs for each Defendant, at remote Periods, where the Proceedings in the Master's Office have been pending there a Length of Time, which merely from Inattention have been overlooked. Such Part of the Bill of Fees as relates to Costs at Law or in the Court of Exchequer, the Master will not tax; he sends the Bill by his Clerk to the respective Officers of the Court where the Business has been done, with a Request that they will tax those Parts of the Bill, and the usual Proceedings, as Appointments, &c. must be followed as in taxing Costs under an Order made by that Court in which the Business has been done; and when the Costs for the Business done there, have been taxed, the Master's Clerk, or the Clerk to the Officer taxing

(*a*) Ord. Canc. Bea. Ed. 186. 289. 1 Cox. Rep. 437.

the Bill, must return the Bill so taxed to the Master in Chancery. If the Bill contains Charges for Conveyancing Business, the Master in Chancery will proceed upon and tax these Charges, he must go through the whole Bill referred (a).

An Inquiry into the Monies received by the Solicitor, is made by filing Interrogatories for the Examination of the Solicitor. The Interrogatories may be prepared by the Solicitor who taxes the Bill, if confined to a bare Inquiry into Receipts and Payments; but if there be an Intricacy in the Account, between the Client and his late Solicitor, Counsel should be advised with, and the Interrogatories prepared, or at least settled by him; and if Deeds and Papers are to be produced, the Interrogatories should point to that Object. The Interrogatories must be fairly copied upon Draft Paper, and left at the Master's Office, and a Warrant "upon leaving the Interrogatories for the Examination of the Solicitor, as to the Monies received, and the Deeds, &c. in his Hands," must be taken out and served upon the other Party; and at the Return another Warrant "to settle the Interrogatories," taken out, and served, and attended. If the Solicitor do not attend after three Warrants regularly taken out and attended, upon Oath made before the Master of the Service of the Warrants, he will proceed *ex parte*, and settle and allow the Interrogatories. The Master makes a Certificate of the Allowance of the Interrogatories, which must be filed at the Report Office, but no Order for Confirmation is necessary. The Interrogatories are engrossed by the Master's Clerk, and the Allowance by the Master marked in the Margin, certifying that those are the Interrogatories he has allowed by his Report. The Interrogatories being complete, a Warrant to "bring in his Examination," must be taken out, and served upon the Solicitor; and if any Delay or Neglect arises in bringing in the Examination, compulsory Measures must be resorted to.

(a) 3 Bro. C. C. 234.

If any Deeds have come into the Hands of the late Solicitor, a Warrant must be taken out and served upon him for the Production of all Books, Papers, and Writings in his Custody or Power, relating to the Matters in Question; and should any Suspicion be entertained, that Deeds or Writings, &c. are with-held, Interrogatories must be exhibited, and the Solicitor examined thereon; in some Cases, an Affidavit may be admitted and the Examination dispensed with; but where the Taxation is carried on very adversely, an Examination upon Interrogatories is the only regular Proceeding to obtain the Information required.

When the Examination is brought in, an Office Copy must be taken from the Master's Office, and it should be looked into to see if full and sufficient; if it be insufficient, Proceedings must be taken to obtain a sufficient Examination. And if an Order has been made to put in his Examination in four Days, or stand committed, and the Solicitor puts in an insufficient Examination, upon Affidavit of Service of the Order and the Master's Certificate of the insufficiency, the Order for the Commitment will be made absolute (a).

If the Examination is sufficient, the Account of Money received by the Solicitor, may be taken, and the Bill of Costs cast up, and the Balance adjusted.

But if it be necessary to examine Witnesses, in the Country, to falsify the Solicitor's Examination, a Commission must be issued; for this Purpose the usual Certificate of the Necessity of such Commission must be obtained from the Master, and filed at the Report Office; and an Order for the Commission obtained, but without such Certificate, the Order and all the Proceedings under it, would be discharged for Irregularity (b).

The Report may be then bespoken of the Master's Clerk, and drawn out, which as it goes only to the Taxation of Costs,

(a) 1 Madd. Rep. 527.

(b) 2 Cox, 108.

is termed a Certificate. The Solicitor taxing the Bill, should pay strict Attention to the Castings, and should not suffer the Certificate to be signed until the Casting of the Bill, and the Sums received by the Solicitor, are properly balanced and struck : it has been held that an Omission of Money paid before the Taxation, will not be allowed to the Client afterwards as a Payment of any Part of what is taxed ; it should have been shewn before, and would have been allowed by the Master in the Taxation, and brought into the Account, and Credit given for it. Lord Hardwicke's Opinion was, that after the Taxation of a Solicitor's Bill, the Client cannot have an antecedent Demand deducted out of what was taxed due to the Solicitor upon his Bill ; for by applying to have the Bill taxed, the Party submits to pay what shall be found due thereon : and the Court is to see that Solicitors do their Clients Justice ; but, says his Lordship, giving Way to an Application of this Kind, would be to repeal the Act of Parliament, if the Court should open the Judgment (for it is a Judgment of the Court upon the Client's own Submission to pay what should be due) to let in this, and have the Account taken (a).

But this seems not to apply where it shall be found upon Taxation, that the Solicitor shall *happen to have been overpaid* ; for, as a Writer of Merit observes (b), the Statute provides for this particular Case, by directing that the Solicitor shall in that Event refund all such Money, as the *Officer shall certify to have been so overpaid* ; and if the Bill of Costs be assigned to a Purchaser, no Order for Payment of any Part of the Bill can be obtained, unless the Solicitor will submit to be examined upon Interrogatories (c). If the Bill of Costs be long, it would be advisable to get the Master to set his Initials against the Item where the Taxation under each Warrant concludes, to prevent one Bill being substituted for another. The Certificate when signed

(a) 2 Ves. 452.

(c) Barn. 293.

(b) Bea. Costs, 234.

by the Master, will be delivered out to the Party taxing the Bill, which must be filed at the Report Office, and an Office Copy taken for Use. This being a Certificate of Costs only, is conclusive, and needs no Confirmation, no Objection nor Exception will lie for *Items* of Costs properly falling within the Description of Costs, though joined with other Matters. If the Party is dissatisfied, he must petition for Leave to except to the Certificate, setting out in his Petition the Items, he conceives, the Master has allowed or disallowed; and upon the Hearing, the Court will decide upon the Merits of the Petition; but being in the Nature of an Appeal, the Vice Chancellor has held that if granted, it must be upon Payment of the taxed Costs into Court (a).

If the Master certifies a Balance to be due from the Solicitor, a Copy of the Report must be served upon the Solicitor, and a Notice that the Petitioner intends to move the Court for an Order for Payment of the Balance reported due. An Affidavit that the Sum reported due is owing and unpaid, and of the Service of a Copy of the Certificate, and of the Notice, should be made and filed, and an Office Copy obtained. Instructions must be given to Counsel, to move for Payment of the Money; and the Court upon hearing the Affidavit and Certificate read, will make an Order for Payment in a Week, or at a Short Day, if the opposite Party do not appear; and that Service of the Order, upon the Party, or his Clerk, or at his Dwelling-house, may be good Service. If he appears, the Court should be applied to, to bind him down to a limited Time, probably it would extend the Order to an absolute Commitment without further Order, unless the Money be paid at a Day mentioned in the Order, so as to prevent any future Application to the Court, especially if the Vacation is near. The Course of Practice is, if at the Expiration of the Time appointed by the Order, the Money be not paid, another Application must be made by Motion, that the Party may stand abso-

(a) 9 Ves. 299. 4 Madd. 394.

lutely committed for Disobedience of the Order, in not paying in the Money thereby directed, grounded upon an Affidavit of the Money, mentioned in the Certificate, being due, and of the Service of the Order, and that the Party has not paid the Money, as by the Order he was directed; and the Court will make an Order that the Party do stand absolutely committed accordingly. (a) This Order must be drawn up, passed, and entered at the Register Office, and delivered to the Serjeant at Arms, or to his Deputy, or in some Cases to the Messenger, or to his Deputy, who will take the proper Steps for executing the Process, to which, if a Caption be made, there is no Bail.

For the Costs incurred in the Course of Taxation, by a legislative Provision, (b) if a sixth Part or more than a sixth Part of the Bill be deducted, the Solicitor shall pay the Costs of Taxation; but if less than a Sixth, then the Court is to award the Costs of the Taxation according to its *Discretion* (c). Here it should be observed, that where more than a Sixth is taken off, the Words of the Statute are *imperative upon the Solicitor to pay the Costs of Taxation*; where in Taxing a Solicitor's Bill *only Two Shillings* made the Difference, and it was thought an extreme Case, for this small Sum, to visit the Solicitor with the Costs of the Taxation, the Court held that they could not enter into that Consideration, that the Act of Parliament had so adjudged it; and the Solicitor was ordered to pay the Costs of the Taxation (d); and the Rule as to Taxation of a Solicitor's Bill is adopted in Bankruptcy, by Analogy to the Statute Geo. 2. and applies to the Bill taxed by the Commissioners: on Re-taxation by the Master, being reduced above the Sixth, the Solicitor has been ordered to pay the Costs of Taxation (e).

(a) 14 Ves. 207.

(b) 2 Geo. 2, c. 23, s. 23.

(c) 2 Hull. Costs, 515. Sayer

261. Tidd's Costs, 79.

(d) 2 Fowl. Exch. 464.

(e) 3 Ves. & Bea. 141.

These Costs are to be obtained by Order as of course upon Motion or by Petition to the Master of the Rolls (see Petition); if the Application be upon Motion, Instructions must be given to Counsel to move for the Costs occasioned by the Taxation of *Mr. Willshire*, the late Solicitor's Bill of Fees, more than a sixth Part having been taxed off, and that it may be referred back to the Master to tax such Costs; an Office Copy of the Master's Certificate of the Taxation must be produced at the same time. If the Application be by Petition, which is the only Course when the Court is not sitting, a Petition in the usual Form must be engrossed and left at the Secretary's Office in the Rolls Yard, and a Fee of 5s. 6d. paid when answered and taken away. The Order must be drawn up, passed, and entered at the Register Office, as before directed, and taken to the Master's Office, and the Bill of Costs occasioned by the Taxation must be left, and a Warrant "*on leaving the Bill of Costs*" taken out, and served upon the Solicitor; and when that Warrant is returnable, successive Warrants "*to tax the Bill of Costs*" must be taken out, and served, until the whole Bill is gone through and taxed, for which proper Instructions have been before given; and when the Bill is cast up, and the Deductions made, the Sums at which the Costs are taxed must be inserted in the Master's Certificate, which is to be filed at the Report Office, and similar Proceedings taken for obtaining Payment as directed in taxing the former Bill.

If the Bill be taxed at less by a Sixth than the Bill delivered, the Costs of Taxation are disposed of at the Discretion of the Court; but if the Deduction arise not by the Taxation of particular *Items*, of themselves liable to Taxation, and chargeable to the Client, but is occasioned by the Disallowance of the Whole of certain Expences stated in the Bill, on the Ground that the Client was *not the Person liable* to those charges, and not because they were *objectionable* in their Nature or Amount; the Courts of Law have held that the Solicitor is not liable to the Costs of Taxation,

Court has done agency Business as Solicitor, his Bill as such is obtained and taxed by the same Course of Practice as a Solicitor's Bill (*a*). For the Recovery of these Fees, it has lately been determined that a Clerk in Court may proceed by Bill in Equity against a Solicitor for Payment of a specific Sum, as the Amount of his Bill for Fees and Disbursements: this Case underwent great Consideration, and from the Observations made by Lord Eldon, in pronouncing the Judgment of the Court, it should seem that a Defendant to such a Bill might relieve himself from the Expences of such a Suit by admitting that he was a Solicitor, and desiring upon Motion a Reference to the Master to take the Account; that the Suit would be ended, and the Court as to Costs, would have an Opportunity of finally doing Justice (*b*).

The Bill of Fees of the personal Representative of a deceased Solicitor may be referred for Taxation (*c*), but he does not seem to be liable to the Costs of Taxation if more than a sixth Part of his Testator or Intestate's Bill is taken off; such Costs being considered personal to the Attorney himself; a Decision not free from Doubt (*d*): nor is it necessary for him to deliver a Bill before an Action is commenced thereon (*e*): And where the Solicitor died after the usual Order to tax, such Order staying Proceedings at Law, till the Report, a Proceeding at Law on the Part of the Representative against the Client, was held not to be a Contempt (*f*); if the Client dies after the Order to tax his Solicitor's Bill, his Representative will not be suffered to revive it without entering into the usual Undertaking to pay what shall be found due on Taxation (*g*).

Lord Rosslyn determined, that a Solicitor admitted in

(*a*) Whittaker v. Goa, Costs, 76. 2 Stra. 1056.
Order 5th May, 1786, MSS. Beam. Costs, 303.

(*b*) 6 Ves. 681.

(*e*) Tidd's Costs, 75.

(*c*) 4 Taunt. 724.

(*f*) 1 Swanst. 58.

(*d*) 2 Hull, 516. Tidd's

(*g*) 2 Atk. 114. Barn. 265.

the Court of Chancery, might practice on the Equity Side of the Exchequer, without being admitted a Solicitor in the latter Court (*a*). But in a recent Case, the Court of Common Pleas held that a Solicitor on the Equity Side of the Court of Exchequer, is not entitled to practice in the Court of Chancery, and that if he does, he cannot maintain an Action for the Amount of his Bill; and that a Solicitor of the Court of Chancery cannot, by Consent in Writing, authorize a Solicitor of the Court of Exchequer to practice in his Name (*b*). And *Lord Chief Justice Best* decided that a Conveyancer, admitted of one of the Inns of Court, practising under a Certificate, not being an Attorney or Solicitor, could not maintain an Action for drawing Deeds, &c. or Attendances, but merely for the Ingrossing, Parchment, and Stamps (*c*).

The Taxation of Agency Bills for Business done in Chancery by a Clerk in Court, or by a Town Solicitor, for a Country Attorney is directed as of course; but not as between *Client and Agent*: Whatever Doubts might formerly have been entertained of the Jurisdiction of this Court on this Head, a Current of Authorities have established the Practice of referring Agency Bills for Taxation (*d*). Lord Hardwicke directed the Taxation of a Bill of Fees and Disbursements for Agency Business (*e*); and upon an Application of a Solicitor in a Cause, to have his own Agent's Bills of Fees taxed, and several Precedents being mentioned, Lord Thurlow made a like Order (*f*). And it is now the settled and established Practice, to refer Bills of this Nature to be taxed as of course. The Proceeding is the same as between Solicitor and Client: an Order must be obtained, either upon Petition (*see Petitions*) to the Master of the Rolls, or upon Motion in Court, for the Delivery and Taxation of the

(*a*) 1 Hen. Bl. 50.

(*b*) 4 Taunt. 452.

(*c*) *Jenkyns v. Slado*, 8th
May, 1824.

(*d*) Dick. 112. 8 Price,
679.

(*e*) Dick. 285.

(*f*) 2 Cox. 173.

Agent's Bill, or for the Taxation of the Bill delivered. The Order must be drawn up, passed, and entered with the proper entering Clerk, at the Register Office, and a Copy of the Order, passed and entered, must be served upon the Agent in the usual Course, and similar Proceedings taken as in taxing Bills of Fees as between Solicitor and Client, for which very full Instructions are before given. It should seem, that in all Cases of Taxation of Bills, as between Solicitor and Client, and Solicitor and Agent if a Bill of Fees has been delivered, whether under an Order or not, and the Bill has been left in pursuance of an Order, at the Master's Office for Taxation, the Solicitor or Agent^f cannot afterwards deliver a fresh Bill for the same Business: the Court of Common Pleas have decided that the Delivery of the former Bill is *conclusive* Evidence against an Increase of Charge in a subsequent Bill on any of the *Items* contained in it; and strong presumptive Evidence against any additional Items; but if any Errors or real Omissions can be shewn in the former Bill, in such Case it has been said, they ought to be allowed, though it seems to be considered purely as Matter of Favour, and not of Right (*a*). And recently Lord Eldon expressed his Determination to strike any Solicitor off the Roll, who undertook Business upon Condition that the Bill of Fees should not be taxed. If any manifest Error appears on the Face of the Bill, or any Omission, the Court would probably give Leave to add to the Bill, but if the Bill of Fees is left in pursuance of the Order, at the Master's Office, the Master cannot, in an adverse Taxation receive any other Bill; he must proceed upon the Bill so left, unless an Order should be obtained, giving the Solicitor or Agent Liberty to deliver a further Bill, which cannot be obtained but under very special Circumstances, and upon Notice (*b*).

The Solicitor after Service and pending the Order for

(*a*) 1 Bos. and Pul. 49.

(*b*) Windale v. Blackburn.
Michas. 1803. MSS.

Delivery and Taxation of his Bill, is restrained by the Statute, from commencing or prosecuting any Action at Law in respect of his Bill ; if in violation of the Statute, he sues at Law, the Court upon a summary Application by Motion or Petition supported by Affidavit of the Fact, would order the Solicitor to discharge the Client out of Custody, and stay the Proceedings with Costs at Law, and of the Application, and in a gross Case by Commitment for the Contempt : the Court of Common Pleas in refusing to stay Proceedings in an Action upon a Bill of Costs under Taxation in the King's Bench, intimated in strong Terms, that if the Taxation had been under their Order, an Attachment would have been granted (a). Recently Lord Eldon refused to go the length of committing a Solicitor who had arrested his Client pending an Order to tax : the Situation the Solicitor held under his Lordship, might have had some weight in the Decision (b) ; but the Statute does not prevent the Solicitor from issuing a Commission of Bankruptcy against the Client, even without delivering his Bill (c).

The Court of Common Pleas would not permit a Defendant to be held to Bail in an Action founded on the Prothonotary's Allocatur for Costs : Lord C. J. Gibbs seemed to express an Opinion that no Action could be maintained (d).

Where either of the Parties in a Suit is made liable to the Payment of Costs, or has actually paid Costs, through the gross Negligence, gross Ignorance, or gross Misbehaviour of his Attorney, the Court will, upon Motion, order such Attorney in the former Case to pay the Costs instead of his Client, and in the latter to reimburse him (e). But in the Taxation of Costs, the Court cannot make the Attorney pay the Costs of Taxation on account of improper Conduct, but only when there are improper Items in

(a) 1 Bos. and Pul. 365

(e) 1 P. Wms. 593. Say.

(b) Ex parte Carr. Easter, 1824.

Rep. 50, 169, 172. 3 Atk. 368. 10 East. 273. 15 Ves.

(c) 11 Ves. 164.

476. 2 Sch. and Lefr. 165.

(d) 4 Taunt. 705.

1 Ves. j. 394.

the Bill amounting to *a sixth* (a), nor would it generally be a Defence in an Action though, it may in some Cases (b).

It has before been observed, that where a Party changes his Solicitor, the Lien the former Solicitor had for his Costs upon Papers, &c. in his Hands, is not affected, the Court has uniformly declared that the Lien is undoubted (c). The Extent to which the Lien is to be carried, seems to be restricted to certain Limits: it has been decided that a Solicitor's Lien for Costs upon a Fund of Assets appropriated to the Agent, subject to securing a Debt from him, and the Testator, as his Surety, and afterwards paid by the Estate, could not be established (d). So a Clerk in Court who lends Money to the Solicitor or the latter to the Client, and takes Security, abandons the Lien (e). If a Country Agent employs an Attorney or Solicitor in the Country in a Cause in Chancery, and the Solicitor employs a Clerk in Court, and the Client pays the Solicitor, but the Clerk in Court remains unpaid, the Client is not bound to pay the Clerk in Court; but, if the latter has any Papers in his Hands, he may retain them (f). A Solicitor who is in Disburse for his Client, has a Right to be paid out of a Duty decreed to an Administrator, and has a Lien upon it before the Creditors of the Deceased, nor can the Administrator controvert this Rule by insisting upon applying the Assets in a Course of Administration (g). Solicitors have a Lien on the Funds for their Costs, whether in the Way of Suit, or Prosecution in Lunacy or Bankruptcy (h). A Solicitor prosecuting a Suit to a Decree, has a Lien on the Estate recovered in the Hands of the Party recovering the Estate, for his Bill, but not in the Hands of his Heir, unless it is necessary to revive

(a) 2 Anstr. 494.

(e) 2 Atk. 114. 307. 3 Atk.

(b) 2 N. R. 136. 2 Hull. 501.

727. 2 P. Wms. 440. 2 Ves.

(c) 4 Term. Rep. 123.

251. Turn. R. 87.

13 Ves. 161. 1 Sch. & Lefr.

(f) 2 P. Wms. 460. 2

315. 16 Ves. 258. 18 Ves. 282.

Ves. 25.

(d) 15 Ves. 72. 2 Ja. &
Wa. 218.

(g) 3 Atk. 720.

(h) 2 Ves. 407.

the Suit, in which Case the Lien is revived (*a*). A Clerk in Court has no Lien upon a Record of the Court, for Fees due, nor to impound a Bill or Answer till Payment of the Office Copy (*b*). *Lord Thurlow* in making an Order upon Mr. Lally, the Defendant's Clerk in Court, for Delivery of the Record which he had detained, until paid for the Office Copy, was pleased to observe that it had been decided that a Clerk of Assize had no Lien upon the Records for Fees (*c*), and that a Clerk in Court's Lien stood upon no better Footing (*d*): but recently upon a similar Application Lord Eldon directed Mr. Radcliffe, the Defendant Clerk in Court, to produce the Office Copy of the Bill to be marked by the Six Clerk, to enable the Defendants to file his Answer upon the Principle that a Clerk in Court could not delay the Cause, but the Detention of the Bill though pressed upon his Lordship's Attention, was not adverted to (*e*).

If an Attorney or Solicitor, pending the Cause, get from his Client an extraordinary Security for the Payment of Money, it will be set aside without any particular Evidence of Imposition: he is not allowed to take a Present without a Bill brought in, though a Client may be generous, and might give more than the Bill: Nor can a Solicitor or Attorney take a Bond from a Client for unliquidated Costs; notwithstanding such Bond and a Mortgage have been given, the Costs may be taxed, and upon Payment the Attorney directed to re-convey, and the Bond to be delivered up. And where the Solicitor has a Mortgage to secure the Payment of his Bill, the Court will order it to be taxed (*f*). And, although the Bill of Costs had been adjusted, and allowed seventeen Years before, where the Solicitor had taken a Judgment of his Client for 400*l*. whilst the Cause was depending, Lord Hardwicke, upon a Petition complain-

(*a*) Amb. 102.

(*e*) 3 Swanst. 93.

(*b*) Ord. Can. Be. 111. 141.

(*f*) 2 Atk. 29, 332. 1

(*c*) 1 Dougl. 194. n. 1 Bl. Smith Rep. 226. 18 Ves. 120. R. 50.

9 Ves. 292.

(*d*) Anon. Hil. 1781.

ing of improper and heavy Charges in the Bill, observed, that notwithstanding the Bill had been adjusted and allowed some Time, yet that the Behaviour of the Solicitor in taking a Judgment casts an Imputation upon him, and was a Practice he could by no means approve; and, as it did not appear that the Client was assisted by any Person of the Profession in looking over and settling the Bill, and there being several very extraordinary Items and improper Charges upon the Face of it, notwithstanding the great Length of Time, the Adjustment, and Allowance, his Lordship referred the Bill to be taxed, and that the Solicitor should be examined upon Oath upon Interrogatories, as to the several Articles upon it, and ordered the Judgment and other Securities to be delivered up immediately (a). So independent of all Fraud, an Attorney should not take a Gift from his Client, while the Relation subsists (though the Transaction be not only free from Fraud) but the most moral in its Nature (b). And it should seem that in all Cases where an exorbitant Reward is taken from the Client *pendente lite*, the Court will either set aside the Security entirely, or reduce it to the Standard of those Fees to which the Solicitor is properly entitled.

The same Rule as to Taxation of Solicitors Bills in Causes is adopted in Bankruptcy; the Course in Bankruptcy, says Lord Eldon, proceeds by Analogy to the Statute, 2 Geo. 2, and the Rule also applies to a Bill taxed by the Commissioners; when, therefore, a Bill on a re-Taxation by the Master was reduced above a *sixth*, his Lordship ordered the Solicitor to pay the Costs (c); and the same Rule was followed where the Reduction arose from the Master disallowing extra Fees paid to the Commissioners for Travelling Expenses (d). The Statute, 5 Geo. 2. di-

(a) 2 Atk. 295, 298.

(c) 3 V. and B. 141. 2 Madd.

(b) 2 Ves. 259. 3 Atk. 93.

R. 329.

13 Ves. 52, 138. 1 P. Wms.

(d) Buck. 129.

118. 3 Ves. 547. 1 Smith Rep.

326. 9 Ves. 292.

rects the Commissioners to tax the Costs up to the Choice of Assignees: Lord Eldon upon a *prima facie* Case of exorbitant Taxation by them, directed a re-Taxation before the Master (a); but the Vice-Chancellor did not think that of course, unless specific Errors were pointed out, because the re-Taxation is in the Nature of an Appeal (b). Where upon a Reference to tax a Bill in Bankruptcy, reserving the Costs of Taxation, and the Bill had been taxed and more than a sixth taken off, and the Solicitor had proceeded at Law for the taxed Costs, not deducting the Costs of Taxation, the Action was directed to be staid, and referred to the Master to tax the Costs of the Taxation, and after deducting the Amount of those Costs from the taxed Costs, that the latter should be paid to the Solicitor (c).

Lord Eldon has expressed his extreme Disapprobation of a Clerk in Court, or Solicitor, being retained on both Sides, and that Instances of great Abuses could be shewn to have arisen from the Practice: that a general Rule of Court, that neither a Solicitor by himself, or his Partner, or a Clerk in Court should be employed on both sides, would be extremely beneficial (d). And his Lordship held that Solicitors in Partnership, could not without the Consent of the Client, dissolve their Partnership, and turn him over to one of them, though they might give him Notice that they would not be any longer concerned for him, and have their Bill of Fees to that Time settled (e). And with the Advice and Assistance of all the Judges, the Master of the Rolls and Vice-Chancellor, his Lordship restrained by Injunction an Attorney who had been jointly employed by a Party in a Cause from becoming the Attorney of the opposite Party in the Suit (f); and Lord Gifford recently ex-

(a) Buck. 111, 422.

(d) 3 Ves. and Bea. 177.

(b) 4 Madd. 395. Bea. Costs, 333.

(e) Cook v. Rhodes, cited 19 Ves. 273.

(c) 4 Madd. 379. 2 Scho. and Lefr. 110.

(f) 19 Ves. 261.

pressed a like Opinion upon a Solicitor acting as such for Parties with conflicting Interests (a). As connected with this Head, it may be useful to subjoin, that a Solicitor taking upon himself to file a Bill in the name of a Client, without any or at least sufficient Authority for that Purpose; upon an Application to dismiss the Bill with Costs, Lord Eldon in making the Order, observed, that if the Plaintiff wished to have the Bill dismissed, it will be so ordered, and the Solicitor directed to re-imburse the Plaintiff all the Expenses occasioned by the Bill being filed without his Authority; and if the Plaintiff denies and the Solicitor asserts Authority to have been given, and there is nothing but Assertion against Assertion, the Solicitor ought to have secured himself by an Authority in Writing, and not having done so, he must abide the Consequence of his Neglect; for, continues his Lordship, there must be *a special Authority* to institute, though a general Authority may be sufficient to defend, a Suit (b); nor could his Lordship agree to the monstrous Proposition, that the making a Person a Party is only *pro forma*: that it is too much for Solicitors to take upon themselves to make Persons Parties without a clear Authority; for that it is a Duty incumbent on the Court, to force Solicitors to be in possession of some Authority from Persons, before they commence Suits in their Names; but adds his Lordship, if a Person who is made co-Plaintiff without Authority, will acquiesce in it, and lie by for four or five Months, his Name ought not then to be struck out (c). And upon an appealed Motion from the Vice-Chancellor by a co-Plaintiff to strike his Name out of the Proceedings as co-Plaintiff, and to discharge the Defendant's Order, dismissing the Bill with Costs, and for payment of such Costs by the Solicitor who had filed the Bill without the Plaintiff's Knowledge or Authority, Lord Eldon in differing

(a) Smith v. Starkie, 12th
Aug. 1824, MSS.

(b) 3 Meri, 12.

(c) 1 Ja. & Wa. 457. Dick.
350. 2 Cox. 240. 1 Ves. j.
200.

from the Vice Chancellor, held that a Person made a co-Plaintiff, though without his Authority or Knowledge, was liable to the Defendant for the Costs of Dismission; but, that he was intitled to be indemnified by the Solicitor, where there was no Laches or Acquiescence, and directed the Solicitor to pay forthwith the Costs paid by the Plaintiff to the Defendant with the Costs of the Application as between Attorney and Client, and all such Costs as he might be put to by Default of the Solicitor in not paying the Defendant's Costs of Dismission (a).

Lastly, should be observed, that it is not necessary that an Agent's Bill should be signed or delivered before the Commencement of an Action (b). And where the Business has been done by an Attorney for a Client, who afterwards becomes himself an Attorney or Solicitor, the former need not deliver a Bill signed in order to recover his Costs (c): And though the Bill be not delivered a Month, the Attorney may set off his Bill if it be delivered Time enough to be taxed before the Trial, (d); but the Rules of Taxation do not apply where the Client and Solicitor appear in Court, as Party and Party (e), nor to a Case where a Party by Agreement has paid the Bill of another Person (f), but a Solicitor will not be allowed to elude the Taxation by interposing Payment by a Trustee between himself and the Parties, *cestui que trust* knowing him to be a Trustee; and the *cestui que trust* may use the name of the Trustee to obtain a Taxation (g).

The Orders of Court direct that after admittance in *forma pauperis*, no *fee*, *profit*, or *reward* shall be taken of the Party admitted, by any *Counsel* or *Attorney* for the dispatch of Pauper's Business during the time it shall depend in Court (a), and be continued in *forma pauperis* (h). From a passage in the original text of the Practical Register, a book as Lord Eldon observes, of considerable Authority (i): Though the Clerks (in the Chancery Offices) take no fees, strictly so called, of a pauper, yet they may charge for their Labour in Writing, after the rate of One Penny per sheet, which is there said to have been allowed by the Lord Keeper in 1628 (k); this has since been increased to Two Pence. The Order for admission assigns a

(a) 1 Ja. & Wa. 674.

(f) 1 Ja. and Wa. 291.

(b) Dougl. 199. n. Peake. Ca.

(g) 3 Meri. 285.

1, 2. 2 H. Bl. 589.

(h) Ord. Canc. Bea. 507.

(c) 1 Esp. N. P. 420.

Bea. Costs. 118.

(d) 1 Esp. N. P. 449.

(i) 1 Swanst. 125.

2 Hull. 502.

(k) Prac Reg. Wy. 320.

(e) 1 Cox. 49.

Counsel and a Six Clerk, and the Notices in Pauper Causes must be signed by a Clerk in Court (a); and by the general Course of Practice, a Solicitor acting under the Order cannot maintain a Bill of Fees, &c. as against a Pauper. This doctrine was lately recognized by *Lord Abbott, C. J.* in an Action for recovering a Bill of Fees, for soliciting a Pauper Cause in Chancery; it was insisted that the Order assigning a Six Clerk was not binding upon a Solicitor, and that if a Pauper chose to employ one, he was bound to pay him his full bill; but his Lordship held that the defendant was not liable for Business done after admission, and that the Solicitor could recover only the Money out of pocket, and must be understood to have given his services for nothing; reducing the demand from £26 to £2, and under the 43 Geo. 3, c. 46, s. 8 the Defendant would have been intitled to his Costs (b).

It is much to be regretted, that the Legislature should have found it expedient, to subject the Profession to the Penalties of a very severe Law for the Prevention of Embezzlement; and by a Stat. 52 Geo. 3, c. 63, to have enacted, That if any Person with whom, (as Banker, Merchant, Broker, *Attorney* or other Agent of *any Description whatsoever*) any Sum or Sums of Money, Bill, Note, Draft, Check, or Order for Payment of any Sum or Sums of Money shall have been deposited, or remain for safe Custody; without any Authority, either general, special, conditional, or discretionary, to sell or pledge the same; shall, in Violation of good Faith, and contrary to the special Purpose for which the same were deposited, *sell, negotiate, transfer, assign, pledge, embezzle, secrete, or in any Manner apply the same to his own Use*, with Intent to defraud the Owner; such Person shall be guilty of a Misdemeanor, and shall be sentenced to Transportation for any Term, not exceeding fourteen Years, or such other Punishment as for a Misdemeanor.

(a) 17 Ves. 387.

(b) *Phillipe v. Baker*, 14 Dec. 1824. MSS.
5 Barn. and Ald. 661.

COSTS
ON THE ISSUING
A COMMISSION OF LUNACY,
AND ON
THE PROCEEDINGS THEREUNDER.

The Committee's Bill of Costs in the Matter of
John Stevens, a Lunatic.

HILARY VACATION, 1823.

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
ATTENDING taking Instructions for a Commission of Lunacy	0	13	4			
March 1st. Attending Dr. Willis, taking Instructions for his Affi- davit	0	6	8			
Drawing same, fol. 8	0	8	0			
Attending, reading over and settling the same	0	13	4	0	6	8
Engrossing same, and Duty	0	5	2			
Attending him reading over the En- grossment, and to the Public Of- fice to get him sworn thereto	0	6	8			
Paid Oath	0	1	6			
Paid filing same	0	10	9			
Drawing Petition for a Commission of Lunacy	0	6	8			
Engrossing same, and Duty	0	6	1			
Paid answering the Petition	0	15	0			
Attending the Lord Chancellor's Secretary, to present same, and afterwards when answered	0	6	8			
Paid filing the Order with the Clerk of the Custodies	0	8	7			
Attending to file the same	0	6	8			
VOL. I.	8 1 9					

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Paid for Commission -	3	16	8			
Solicitor's Fee on suing out the same - - -	2	2	0			
Attending the Petitioner, advising as to executing the Commission, taking Minutes of the Age, Relations, &c. - - -	0	6	8			
Attending the Commissioners severally to get them to appoint a Time for executing the Commission - -	1	0	0	0	18	4
Drawing and engrossing Precept to the Sheriff to summon the Jury	0	5	0			
Drawing and engrossing Warrant to produce the Lunatic -	0	5	0			
Drawing and engrossing five Subpoenas for Witnesses -	0	15	0			
Paid the Commissioners their Fees on signing the same -	3	3	0			
Attending them severally, and Solicitor's Fee thereon -	1	0	0			
Making a Copy of the Precept to keep - - -	0	1	0	0	1	0
Attending the Sheriff to fix with him the executing the Commission, and to deliver him the Precept	0	6	8			
Service of Subpoena on Dr. Warburton in Clifford Street, and Copy to keep - -	0	5	0			
The like on Mr. Darton -	0	5	0			
Perusing Deeds and Writings, and drawing out an Account of the Lunatic's Estate to prove the same on the Execution of the Commission - -	0	18	4	0	6	8

IN THE CASE OF A LUNATIC. 881

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Attending the several Witnesses, examining them, and taking an Account of their Evidence	0	13	4	0	13	4
Drawing Account of Arrears of Rent, and fair Copy -	0	12	6	0	2	6
Drawing the Inquisition in Blank very long and special -	0	13	4			
Fair Copy - - -	0	12	6			
Attending Mr. Evance, one of the Commissioners, settling the same	0	6	8	0	6	8
Fair Copy to exhibit to the Jury	0	12	6			
Paid the Commissioners each Three Guineas - - -	9	9	0			
Paid Coach Hire for Commissioners and Witnesses, &c. (a) -	1	8	0	1	8	0
Paid the Sheriff - -	3	3	0			
Paid the Jury -	16	16	0			
Paid the summoning Officer	2	2	0			
Paid the Cryer -	0	5	0			
Paid the Bill of Expences of Com- missioners, Sheriffs, Jury, &c.	22	6	0			
Paid Dr. Fras. Willis, for his Attendance in the Business	5	5	0			
Engrossing the Inquisition	0	15	0			
Paid for Parchment and Duty	0	18	6			
Paid the Commissioners examining and signing the same -	3	3	0			
Solicitor's Fee thereon -	1	1	0			
Paid filing the Commission, and In- quisition, and for Office Copy	2	4	10			
Attending for that Purpose	0	6	8			
Entering a Caveat against any Per- son taking the Grant -	0	5	0			

(a) Coach Hire is never allowed even between Solicitor and Client.

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Attending to enter same -	0	6	8			
Attending taking Instructions for special Affidavit -	0	6	8			
Drawing Affidavit stating the Lunatic's Relations -	0	12	8			
Engrossing it, and Duty -	0	6	7	0	2	6
Paid Oath -	0	1	6			
Paid filing -	0	4	8			
Instructions for Petition to the Lord Chancellor to appoint a Committee of the Person and Estate -	0	6	8			
Drawing Petition, fol. 14 -	0	15	0	0	1	0
Engrossing it, and Duty -	0	7	2			
Paid answering -	1	7	6			
Attending to present same, and afterwards for same when answered	0	6	8			
Paid filing the Order with Clerk of the Custodies -	0	8	8			
Attending filing same -	0	6	8			
Attending Mr. Darton, taking Instructions for his Affidavit of the Lunatic's Estate and Effects	0	6	8			
Drawing the same, fol. 24 -	1	4	8	0	0	8
Attending settling same -	0	13	4	0	6	8
Engrossing, Duty, and Oath	0	12	2			
Attending him reading over the same, and afterwards to the Public Office to be sworn	0	6	8			
Paid filing his Affidavit -	0	10	6			
Attending the Clerk of the Custodies to get the Sum fixed for which Security was to be given -	0	6	8			
Attending the Attorney-General thereon several Times -	0	6	8			

IN THE CASE OF A LUNATIC. 883

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Attending when the Sum was settled for which Security should be given - -	0	13	4	0	6	8
Attending Mr. Darton, and taking Instructions for Sureties	0	13	4			
Attending the Clerk of the Custodies with the Names of the Sureties, and to get him to prepare Bond and Affidavit -	0	6	8			
Attending the Execution of the Bond by the Committee	0	13	4	0	6	8
The like Attendance on the Sureties - - -	0	6	8			
Attending the Sureties to read over the Affidavit of Justification to them, and attending them to be sworn - -	0	6	8	0	6	8
Paid Oaths - -	0	3	0			
Drawing and engrossing Affidavit of the due Execution of Bond, and paid Duty - -	0	7	1			
Paid Oath and Exhibit -	0	4	0			
Drawing Bond of Indemnity from the Committee, fol. 18	0	18	0			
Fair Copy - -	0	6	0			
Engrossing same, and Duty	1	15	4			
Attending the Execution -	0	6	8			
Attending the Clerk of the Custodies with the Bond and Affidavits, and to bespeak the Grant	0	6	8			
Paid in Part for the Grant	12	12	0			
Solicitor's Fee on the Grant of Person and Person -	2	2	0			
Paid the Remainder of the Fees, enrolling, &c. - -	10	13	2			

3 L 2

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Solicitor's Fee for getting the Grant enrolled - - -	1	1	0	1	1	0
Attending Mr. Darton with the same, and to take his further Instructions	0	6	8			
Drawing Power of Attorney to receive Rents, &c. - -	1	6	8			
Engrossing the same -	0	6	6			
Attending the Execution -	0	6	8			
Attending at the Bank with the Grant to get it registered there, and paid - -	0	18	4			
The like Attendance at the South-Sea House, and paid -	0	18	4			
Attending the several Tenants of the Lunatic in various Parts of the Town for an Account of the Arrears of Rent due, and to inform them that their Rents must in future be paid to the Committee	1	1	0	0	6	8
Letters and Messengers -	0	10	0	0	5	0

TRINITY VACATION, 1823.

Taking Instructions for Petition for Maintenance - -	0	6	8			
Drawing same, folio 8 - -	0	8	0			
Engrossing same, and Duty -	0	6	1			
Paid answering - -	0	15	0			
Attending to present same, and afterwards for same answered -	0	6	8			
Making a Copy of the Order for the Master - -	0	2	6			
Attending the Committee taking Instructions for Proposal for Maintenance - - -	0	13	4	0	6	8
Drawing and fair Copy Proposal to lay before the Master, fol. 21 -	1	1	0			

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Warrant on leaving Copy, and service - - -	0	5	6			
Warrant to proceed, Copy, and Service - - -	0	5	6			
July 6th. Attending thereon, when the Master directed a Scheme to be laid before him for the Maintenance of the Lunatic in future, and an Affidavit of the Expences incurred hitherto - -	0	6	8			
Attending taking Instructions for Affidavit - -	0	13	4	0	6	8
Drawing the same, fol. 9 -	0	9	6	0	0	6
Engrossing it - -	0	3	6	0	0	6
Paid Duty and Oath -	0	4	2			
Attending Mr. Darton, settling and afterwards reading it over and attending him to be sworn -	0	13	4	0	6	9
Warrant on leaving same, Copy, and Service - -	0	5	6			
Warrant to proceed on the Proposal, Copy, and Service -	0	5	6			
Attending thereon, Proposal allowed	0	6	8			
Warrant on the Report being prepared, Copy, and Service -	0	5	6			
Paid for Office Copy of the Draft, fol. 80 - -	0	15	0			
Warrant to settle the same, Copy, and Service - -	0	5	6			
Attending thereon -	0	6	8			
Warrant to sign the same, Copy, and Service - -	0	5	5			
Paid transcribing the Report, Stamp, &c. - -	0	14	0			
Paid for the Report - -	1	0	0			
Gave the Master's Clerk -	2	2	0			

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Paid filing the Report and Order	1	10	0			
Attending Master for Report, and attending filing -	0	6	8			
Drawing Petition to confirm the Master's Report -	0	15	0			
Engrossing and Duty -	0	8	7			
Copy for the Lord Chancellor	0	5	0			
Paid answering -	0	16	0			
Attending to present same, and after- wards for Answer -	0	6	0			
Brief for Counsel to confirm the Re- port - -	0	6	8			
Paid Mr. Roupel and Clerk	1	3	6			
Attending him -	0	6	8			
Attending Court, 27th, and 28th, of July, the Petition in the Paper, and heard -	1	0	0			
Paid Court Fees -	0	12	6			
Paid for the Order -	1	9	0			
Attending passing same -	0	13	4			
Paid filing - -	0	16	0			
Attending the Lord Chancellor's Secretary thereon -	0	6	8			

MICHAELMAS TERM, 1823.

Instructions to prepare Petition for an Order to tax the Committee's Costs - -	0	6	8			
Drawing Petition, fol. 8	0	8	0			
Engrossing it, and Duty -	0	5	7			
Paid answering - -	0	15	0			
Attending the Lord Chancellor's Secretary to leave same, and after- wards for same answered	0	6	8			
Copy for the Master -	0	2	6			

Copy and Service thereof		0	5	0
Paid filing	-	0	10	6
Letters and Porters.	-	0	5	0

HILARY TERM, 1824.

Drawing Bill of Costs and fair Copy,				
fol. 46	-	1	10	8
Warrant on leaving, Copy, and Ser-				
vice	-	0	5	6
Warrant to tax the same, Copies,				
and Service	-	0	5	6
Attending taxing	-	0	6	8
Paid for Report	-	1	5	0
Transcribing, Stamp, &c.		0	11	6
Gave Master's Clerk	-	1	1	0
Filing same	-	0	7	6
Letters and Porters	-	0	5	0

COSTS OF THE NEXT OF KIN,

(Generally included in the Committee's Costs.)

TRINITY VACATION, 1823.

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
PAID for Copy Proposal, fol. 21	0	10	6			
July 6th. Attending Warrant thereon, and proceeded -	0	6	8			
Paid for Copy Affidavit of Mr. Darton, fol. 9 - -	0	4	6			
Attending another Warrant on the Proposal, when the same was allowed - - -	0	6	8			
Paid for Copy Draft Report, fol. 30 - - -	0	15	0			
Attending Warrant to settle the same	0	6	8			
Making Brief Petition to confirm Report for Counsel, and fair Copy - -	0	10	0			
Gave Mr. Maddock therewith, and Clerk - -	1	3	6			
Attending him -	0	6	8			

HILARY TERM, 1824.

Paid for Copy Bill of Costs, fol. 46	1	3	0
Attending taxing same on Behalf of next of Kin - -	0	6	8

In the Matter of JOHN STEVENS, a Lunatic.

Costs of the Committee on passing his Account.

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
ATTENDING taking Instructions for Petition - - -	0	6	8			
Drawing Petition, engrossing same, and Duty, fol. 15 -	1	5	2			
Attending to leave the same with the Secretary of Lunatics, and after- wards to take the same away an- swered - - -	0	6	8			
Paid answering -	0	15	0			
Paid filing Petition, and for Office Copy - - -	0	7	6			
Attending thereon -	0	6	8			
Making a Copy of the Petition and Order for the Master -	0	7	6			
Drawing and fair Copy Account from Lady-Day, 1822, to Lady- Day, 1823, fol. 40 -	1	6	8			
Warrant on leaving the Account, Copies and Service -	0	5	6			
Warrant to proceed thereon, Copies, and Service -	0	5	6			
Attending thereon -	0	6	8			
Paid entering the Account in the Book to be sworn to, and Sta- tioner - - -	0	18	0			
Paid for a Book for that Purpose	0	5	0			

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Paid the Master's Clerk drawing and engrossing Affidavit to verify the Account, Duty and Oath	0	8	8			
Paid for Copy Affidavit, fol. 5	0	2	6			
Paid for Copy Draft Report, fol. 15	0	7	6			
Warrant on preparing same, Copy and Service - -	0	5	6			
Paid for two Warrants to settle and sign Report, Copies, and Service	0	11	0			
Attending thereon -	0	6	8			
Drawing Bill of Costs and Copy, fol. 12 - -	0	12	0	0	4	0
Warrant on leaving the same, Copies, and Service -	0	5	6			
Warrant to tax, Copies, and Service	0	5	6			
Attending thereon -	0	6	8			
Paid for a Duplicate of the Account to annex to Report, fol. 40	1	0	0			
Paid for Master's Allowance	0	5	0			
Report and transcribing, Stamp, and Master's Clerk -	2	12	6			
Paid filing Report -	1	5	0			
Attending to file Report, Order, &c.	0	6	8			
Letters and Messengers -	0	5	0			

BILL OF COSTS OF THE COMMITTEE,

For Payment of Money in his Hands into Court.

In the Matter of JOHN STEVENS, a Lunatic.

	£	s.	d.
ATTENDING taking Instructions to prepare Petition for the Purposes before mentioned -	0	6	8
Drawing Petition, fol. 25 -	1	5	0
Engrossing and Duty -	0	10	0
Attending Secretary of Lunatics to present Petition, and afterwards to take away the same when answered -	0	6	8
Paid answering -	0	18	0
Copy thereof for Lord Chancellor -	0	8	4
Copy and Service -	0	10	4
Attending taking Instructions for Affidavit of Facts in support of Petition -	0	6	8
Drawing and engrossing same, Duty and Oath	0	12	7
Attending reading over, before sworn, and attending Deponent to be sworn -	0	6	8
Paid filing and for Office Copy -	0	10	2
Attending searching for Affidavit filed to oppose the Petition -	0	7	8
Copy Brief Petition and Affidavit for Counsel	0	10	8
To Mr. Roupel, and Clerk -	2	4	6
Attending him -	0	6	8
Drawing and engrossing Affidavit of Service, Duty and Oath -	0	8	1
Paid filing and for Office Copy -	0	6	10
Attending Court, Petition in the Paper	0	6	8
The like Petition heard, and Order made	0	13	4
Paid Court Fees -	0	13	0
Paid for Minutes -	0	5	0

	£	s.	d.
Attending Secretary to settle same -	0	6	8
Paid for Order - - -	2	8	4
Copy to serve, and Service - -	0	10	0
Drawing State of Facts, fol. 18 -	0	12	0
Warrant on leaving, Copy, and Service -	0	5	6
Warrant to proceed, Copy and Service -	0	5	6
Attending thereon - - -	0	6	8
Drawing Bill of Costs and Errors of Mr. Stevens, the Committee, fol. 19 - -	0	12	8
Warrant on leaving, Copy, and Service -	0	5	6
Warrant to proceed, Copy and Service -	0	5	6
Attending taxing - - -	0	6	8
Paid for Copy of Costs of the Next of Kin	0	8	0
Attending Taxing - - -	0	6	8
Warrant on preparing Draft of Report, Copy, and Service - - -	0	5	6
Warrant to settle same, Copy, and Service	0	5	6
Attending thereon, and proceed - -	0	6	8
Warrant to sign Report, Copy and Service	0	6	0
Attending thereon - - -	0	6	8
Paid for Report - - -	1	5	0
Paid Master's Clerk transcribing, Stamp, &c.	2	1	0
Attending Master for Report, and attending to file same, and for Office Copy -	0	6	8
Paid filing and for Office Copy -	2	3	4
Duplicate to file at the Report Office, and paid	1	3	0
Attending to file same - - -	0	6	8
Attending at the Accountant-General's Office to pay in the Balance reported due, and bespeak his Direction to the Cashier at the Bank	0	6	8
Attending at the Bank to pay in the Money, and afterwards on the Accountant-General, to file Cashier's Receipt - -	0	13	4
Paid for Office Copy Cashier's Certificate	0	7	6
Letters and Messengers - -	0	5	0

BILL OF COSTS

FOR

VACATING RECOGNIZANCE.

	£	s.	d.
INSTRUCTIONS for Petition to vacate the Com- mittee's Recognizance - -	0	6	8
Drawing and engrossing, Duty, and Oath	0	18	6
Paid answering - - -	0	16	0
Attending to present Petition, and for same when answered - - -	0	6	8
Copy thereof for the Lord Chancellor -	0	3	4
Two Copies to serve, and Service -	0	10	8
Attending searching for the Inrolment of Recog- nizance - - -	0	6	8
Paid for Office Copy - -	0	18	0
Brief Copy Petition for Counsel -	0	10	0
Gave Fee to Mr. Roupel and Clerk -	1	3	6
Attending him therewith - -	0	6	8
Attending Court, Order made -	0	13	4
Paid Court Fees and Officers -	0	12	6
Paid for Order and Duplicate -	3	14	6
Paid filing - - -	0	9	6
Attending Secretary, passing and entering same	0	6	8
Paid Clerk of Inrolments, vacating Fee, and other Officers - - -	1	16	0
Attending thereon - - -	0	6	8
Letters and Messengers - -	0	5	0

BILL OF COSTS

FOR SUING OUT .

A COMMISSION OF LUNACY,

And of the Grant of the Person and Estate, and incidental Proceedings.

In the Matter of ANNA BETTESWORTH, a Lunatic.

TRINITY TERM, 1823.

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
ATTENDING Mr. James Lounds, several Times consulting, and ad- vising about taking out a Com- mission of Lunacy against Mrs. Bettesworth, and attending several Persons, and taking Minutes of her Conduct and Behaviour, to prepare Affidavit of her Insanity to obtain such Commission -	0	13	4			
Instructions for Affidavit	0	6	8			
Drawing Affidavit of Anna Lounds, and others, fol. 10 -	0	10	0			
Engrossing same, and Duty	0	11	7	0	5	7
Five Oaths -	0	7	6			
Attending to read over same, and attending swearing -	0	6	8			
Instructions for special Petition	0	6	8			
Drawing and engrossing Petition for a Commission of Lunacy, and Duty	0	6	8			
Attending Lord Chancellor's Secre- tary therewith -	0	6	8			
Paid answering -	0	15	0			

BILL OF COSTS, &c.

895

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Paid filing Affidavit -	0	7	4			
Paid for Commission of Lunacy	6	9	6			
Solicitor's Fee for suing out the Commission - -	2	2	0			
Attending Mr. Lounds, to advise about the Execution of the Commission and Expences -	1	1	0	0	6	8
Letters and Messengers -	0	5	0			

MICHAELMAS TERM, 1823.

Mr. James Lounds dying before the executing the same ; attending the Secretary of the Lunatics to advise about renewing the said Commission, when he said there must be an Application for a new Commission on fresh Affidavits	0	6	8			
Attending Mr. Lounds, Mrs. Nash, Mrs. Fitzgerald and others, to prepare fresh Affidavits	0	6	8			
Drawing Affidavits of Mr. Fitzgerald and others, fol. 20 -	1	0	0			
Engrossing same, and Duty	0	12	6	0	0	6
Four Oaths -	0	6	0			
Attending to read over same, and attending swearing -	0	6	8			
Drawing and engrossing Petition for a new Commission of Lunacy	0	6	8			
Attending Lord Chancellor's Secretary therewith -	0	6	8			
Paid answering Petition -	0	15	0			
Paid filing Affidavit -	0	10	4			
Paid for Commission of Lunacy	6	9	6			
Solicitor's Fee thereon -	2	2	0			
Three fair Copies of the Commission						

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
for the Commissioners, and attending to appoint a Meeting -	0	13	4	0	6	8
Attending to examine the Evidences of the several Witnesses, previous to their attending the Execution of the Commission -	0	13	4			
Drawing and engrossing Precept to the Sheriff to summon a Jury, Parchment and Duty, and fair Copy for Commissioners to sign	0	10	0			
Drawing Summons for Witnesses	0	2	6			
Attending Mr. Evance, one of the Commissioners, at Walcot Terrace, Lambeth, to sign Precept, and Warrant for producing the Lunatic - -	0	13	4	0	6	8
Paid him his Fee -	1	1	0			
Attending Mr. Beames, one of the Commissioners in the Temple, for the same Purpose -	0	13	4	0	6	8
Paid him his Fee -	1	1	0			
Attending Mr. Welfit, the other Commissioner in Lincoln's Inn, for the same Purpose -	0	13	4	0	6	8
Paid him his Fee -	1	1	0			
Attending the Under Sheriff with Precept to summon a Jury	0	6	8			
Drawing and engrossing Inquisition on Paper, for the Commissioners and Jury to sign -	1	1	0			
Paid Mr. Evance, Mr. Beames, and Mr. Welfit, three Commissioners, for their Attendance on the Execution of the Commission, two Guineas each - -	6	6	0			

IN A COMMISSION OF LUNACY. 897

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Paid eighteen Jurors for their Attendances, one Guinea each	18	18	0			
Solicitor's Fee, when Mrs. Anna Bettesworth was found a Lunatic	2	2	0	1	1	0
His Clerk - - -	1	11	6	1	11	6
Paid the under Sheriff his Fee	2	2	0			
Paid the summoning Officer his Fee	1	1	0			
Paid the Tavern Bill at the King's Head - - -	10	6	0			
Engrossing Inquisition, Parchment, and Duty - - -	1	6	0			
Attending Mr. Evance, one of the Commissioners, at Walcot Terrace, Lambeth, to examine the Inquisition, and to sign the same	0	13	4	0	6	8
Paid him his Fee thereon	1	1	0			
Attending Mr. Welfit, on the same Occasion - - -	0	13	4	0	6	8
Paid him his Fee thereon -	1	1	0			
Attending Mr. Moore on the same Occasion - - -	0	13	4	0	6	8
Paid him his Fee thereon	1	1	0			
Attending at the Petty-Bag Office, to file the Inquisition, and to bespeak an Office-Copy - - -	0	6	8			
Paid filing and for Office-Copy	1	4	7			
Letters and Messengers - - -	0	5	0			

HILARY TERM, 1824.

Drawing Petition for Mrs. Anna Lounds, to be Committee of the Lunatic's Person and Estate	0	13	4			
Engrossing and Duty - - -	0	8	3			
Paid answering - - -	0	16	0			
Four Copies to serve on the Next of Kin, and served accordingly	1	6	8			

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Drawing Affidavit of Mrs. Anna Lounds, to ascertain the Next of Kin	0	8	0			
Engrossing and Duty	0	5	8			
Oath, and attending swearing	0	8	2			
Office-Copy	0	4	7			
Fair Copy of Petition for Lord Chancellor	0	6	0			
Drawing and engrossing Affidavit of Service and Petition	0	7	8			
Paid for Office-Copy thereof	0	6	10			
Attending searching whether the Next of Kin had filed any Affidavit	0	6	8			
Drawing Brief of Petition for Counsel, fol. 3	1	0	0			
Fair Copy with Counsel	0	10	0			
To Mr. Roupel with Petition, and Clerk	2	4	6			
Attending him	0	6	8			
The Next of Kin having signified their Desire to consent, fair Copy, Brief of Petition, &c. for Counsel	0	10	0			
To Mr. Hart and Clerk	1	3	6			
Attending Counsel	0	6	8			
Attending Court, Petition in the Paper	0	6	8			
Attending again, Petition in the Paper	0	6	8			
Attending again	0	6	8			
Attending again when Petition heard and granted	0	13	4			
Paid Court Fees	0	12	0			
Attending at the Secretary of Lunatics for the Order, and to examine the same	0	6	8			
Paid for Order	1	9	0			
Attending Mrs. Anna Lounds, to						

IN A COMMISSION OF LUNACY. 899

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
inquire into the Value of the Lunatic's Estate - -	0	13	4	0	6	8
Attending the Accountant-General for Costs of Transfer of Annuity to Lunatic's Account, and paid for Office-Copy, and entering same in the Report Office -	0	8	2			
Drawing and engrossing Affidavit of the Lunatic's Fortune -	0	8	8			
Paid Oath and attending swearing	0	8	2			
Attending Mrs. Anna Lounds, about getting proper Securities for the Committeeship -	0	6	8			
Letters and Messengers -	0	5	0			

EASTER TERM, 1816.

Attending Sureties to read over Security Bond - -	0	6	8	0	6	8
Attending the Execution of the Bond by the Sureties, and to the Public Office to swear to the Sufficiency, the due Execution of the Bonds - -	0	6	8			
Paid for Oaths and Exhibits	0	7	0			
One of the Sureties being disapproved of by the Attorney-General, attending the Attorney-General relating to this Business	0	6	8			
Attending leaving the Name of the fresh Security with the Clerk of the Custodies - -	0	6	8	0	6	8
Attending the Execution of another Bond by the Surety, and to the Public Office to swear to their						

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Sufficiency, and the due Execu- tion of the Bond -	0	6	8			
Paid for Oath and Exhibit -	0	7	0			
Paid Clerk of the Custodies his Fees, for the Grant of the Custody of the Person and Estate of the Lu- natic -	23	2	10			
Solicitor's Fee for suing out the Grant -	2	2	0			
Letters and Messengers -	0	5	0			
TRINITY TERM, 1816.						
Instructions to draw Petition for a Reference to the Master to take the Committee and her late Hus- band's Accounts, to tax Costs of suing out Commission of Lunacy, and to settle an Allowance for the Lunatic's Maintenance -	0	13	4	0	6	8
Drawing Petition accordingly, fol. 18	0	18	0			
Engrossing and Duty -	0	8	8			
Paid answering -	0	18	0			
Attending Lord Chancellor's Secre- tary therewith, and for same when answered -	0	13	4	0	6	8
Instructions to draw special Affidavit	0	6	8			
Drawing Affidavit of Richard Chit- ter to ascertain the Next of Kin	0	6	8			
Engrossing and Duty, and paid swearing and attending	0	12	10			
Paid for Order and entering	0	15	0			
Drawing Particular of the real and personal Estates of the Lu- natic, and fair Copy for the Mas- ter, fol. 6 -	0	4	0			

IN A COMMISSION OF LUNACY. 901

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Warrant on leaving, Copy, and Service	0	5	6			
Paid for Office Copy for the Next of Kin	0	3	0			
Drawing the Committee's Accounts of her and her late Husband's Receipts out of the Lunatic's Estates, and fair Copy for the Master, fol. 12	0	8	0			
Warrant on leaving Copy, and Service	0	5	6			
Attending thereon for the Committee	0	6	8			
The like Attendance for the Next of Kin	0	6	8			
Paid for Office Copy of the Committee's Accounts for the Next of Kin	0	6	8			
Warrant to proceed, Copy, and Service	0	5	6			
Attending thereon for the Committee, when the Accounts were allowed	0	6	8			
The like attendance for the Next of Kin	0	6	8			
Drawing the Committee's Accounts of her and her late Husband's Payments, out of the Lunatic's Estate, and fair Copy for the Master, fol. 30	1	10	0	0	0	
— 12th. Warrant on leaving, Copy, and Service	0	5	6			
Warrant to proceed, Copy, and Service	0	5	6			
Attending Warrant of 12th for Committee	0	6	8			

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
The like Attendance for the Next of Kin - - -	0	6	8			
Paid for Office Copy of Committee's Account of Payments for Next of Kin - - -	0	15	0			
Two Warrants, Copy, and Service to proceed - -	0	11	0			
Attending thereon for Committee	0	13	4			
The like for Next of Kin -	0	13	4			
Letters and Messengers -	0	5	0			

MICHAELMAS TERM, 1824.

Drawing Bill of Costs, and Copy fol. 60 - - -	2	0	0			
Two Warrants on leaving, Copy, and Service - -	0	11	0			
Warrant to tax, Copy, and Service	0	5	6			
Paid for Copy, Bill of Costs, fol. 60 - - -	1	10	0			
Attending Warrant of 31st January to tax for Committee -	0	6	8			
The like for Next of Kin -	0	6	8			
Drawing fair Copy of Proposals for Maintenance of Lunatic for the Time past and to come, fol. 24	0	16	0			
Warrant on leaving, Copy, and Service - - -	0	5	6			
Warrant to proceed on Committee's Proposals for Maintenance, Copy, and Service - -	0	5	6			
Paid Mr. Charsley for drawing and engrossing Affidavit of the Rebuilding the Barn on the Lunatic's Estate, &c. -	0	10	6			
Attending Warrant on the Commit-						

IN A COMMISSION OF LUNACY. 903

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
tee's Proposal for Maintenance of the Lunatic and settling same	0	6	8			
The like for Next of Kin	0	6	8			
Drawing and engrossing Affidavit of the Value of the Lunatic's Estate, for the Master attending and paid swearing	0	12	2			
Copy, Draft of Report, fol. 40	1	0	0			
Two Warrants to settle Draft of Report	0	11	0			
Attending thereon for Committee	0	13	4	0	6	8
The like for the Next of Kin	0	13	4	0	6	8
Warrant to sign Report, Copy, and Service	0	5	6			
Attending Master thereon	0	6	8			
Paid for Report	1	5	0			
Paid transcribing, and Stamps, &c.	0	18	0			
Master's Clerk	2	2	0			
Paid filing Report and Order of Reference	1	18	6			
Attending Master for Report, and tending filing	0	6	8			
Drawing Petition to confirm Report, and for Allowance of the Lunatic's Maintenance, fol. 18	0	18	0			
Engrossing and Duty	0	9	2			
Paid answering, when an Attend- ance was ordered	0	16	0			
Attending Lord Chancellor's Secre- tary to present same, and after- wards for same answered	0	6	8			
Copy, Petition, and Order for Lord Chancellor	0	18	0			
Two fair Copies, Petition, and Order for Counsel, fol. 36, each	2	8	0	1	4	0

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
To Counsel, with Brief for Committee, and Clerk - -	3	5	6			
Attending Counsel -	0	6	8			
To Counsel, with Brief for Next of Kin - -	2	2	0			
Attending thereon - -	0	6	8			
Attending Court Petition in Paper	0	6	8			
The like when heard -	0	13	4			
The like Attendance for Next of Kin - -	0	13	4			
Paid Court Fees -	0	13	0			
Paid drawing up Order -	2	8	4			
Paid entering - -	0	9	0			
Paid Secretary of Lunatics for drawing up Order to confirm Report, and for Duplicate -	0	15	0			
Several Attendances on Lord Chancellor's Secretary -	0	13	4	0	6	8
Paid filing Order with Clerk of the Custodies - -	0	15	0			
Several Attendances on the Clerk of the Custodies -	0	13	4	0	6	8
Letters and Messengers -	0	5	0			

PRACTICAL DIRECTIONS AND REMARKS

In issuing a Commission of Lunacy, and the Proceedings thereon, and in Matters of Lunacy generally.

THE present Work being intended to convey to the Junior Branches of the Profession, such Information as will enable them to form a general Idea of the Subject Matter on which it professes to treat, and to enter upon the Practice, with Ease to themselves, and Satisfaction to their Clients, it would be extending this Treatise beyond its intended Limits, to enter much at large into the Law of Lunacy; it may therefore be sufficient to introduce the Head of Lunacy, by stating so much as will be sufficient to form a general Idea upon the Subject, referring for more extensive Information to those Authors who have written professedly upon this particular Topic; and premising thus much we may be allowed at once to state, that the general Description of a Person, who from his Want of Reason and Understanding, comes within the Protection of the Law, is that of *non compos mentis*, a Lunatic, or *non compos mentis*, is defined by Mr. Justice Blackstone (a), to be one, who has had Understanding, but by Disease, Grief, or other Accident has lost the Use of his Reason; a Lunatic is properly one who hath lucid Intervals, sometimes enjoying his Senses, and sometimes not, and that frequently depending upon the Change of the Moon; but under the general Name of *non compos mentis*, which Sir Edward Coke says is the most legal Name, are

(a) 1 Bl. Comm. 304.

comprised, not only Lunatics, but Persons under Frenzies, or who lose their Intellect by Disease: those who grow deaf, dumb, and blind, not being born so; or such, in short, as are adjudged by the Court of Chancery incapable of conducting their own Affairs (*a*).

A Person born deaf and dumb, is *prima facie* within the Definition of Idiot, but daily Experience proves him not so (*b*). Lunacy is a partial Derangement of the intellectual Faculties, the Senses returning at uncertain Intervals (*c*).

Madness is a total Alienation of Mind (*d*).

An Idiot is defined to be one, who cannot count twenty-pence, or tell who his Father or Mother were, or how old he is, or that hath no Understanding or Knowledge of what shall be for his Profit or what for his Loss; but if he have such Understanding that he knows or understands his Letters, and to read by teaching or information of another Man, then it seems he is not a Fool, nor a natural Idiot, which seems more properly to belong to one who has had no Understanding from his Birth, and is therefore by Law presumed never likely to attain any (*e*).

These Defects must be unequivocal and plain, not an idle frantic Humour, or unrecoverable Mode of Action, but an absolute Dispossession of the free and natural Agency of the Human Mind (*f*).

Weakness is not such a Defect as will ground a Commission of Lunacy or Idiocy (*g*); for a Man may be weak as to Figures and not so as to his Estates. Lunacy is a Distemper occasioned either by Disorder or Accident, and to one of those two Cases Commissions were formerly confined; but at length this Part of the Prerogative, this paternal Care was enlarged, and extended to one who

(*a*) 1 Inst. 2.

(*b*) 1 Hale, 34.

(*c*) 4 Bl. Com. 24.

(*d*) 4 Co. 124. 1 Hale, 30.

(*e*) 1 Bl. Com. 302.

(*f*) 1 Hale, 4. 8 State Trials, 332.

(*g*) 2 Vcs. 208.

was *non compos mentis* ; and here it stopped, and this at least a Court of Equity insists must be found to entitle any one to a Commission : and therefore though a Jury find that one is incapable of managing his Affairs, yet such a finding is insufficient ; they must find him to be of unsound Mind. A Man may be of weak Understanding, and of no Resolution of Mind ; but this is not sufficient to ground a Commission ; if he never were of better Understanding, perhaps a Commission of Idiocy might issue.

A Person found a Lunatic by a competent Jurisdiction abroad, may be considered a Lunatic in England, for the personal Capacity in general is regulated by the Law of the Country (a).

The King, as *Parens Patriæ*, has the Protection of all his Subjects, and in a peculiar Manner he is to take Care of all those, who from their Imbecility and Want of Understanding are incapable of taking care of themselves : this is called a Prerogative in the Crown, a *Regium munus*, or Duty which the King owes to all his Subjects.

The King by his Prerogative, whether derived from the Common Law or Statute (b), has the sole Interest in granting the Estate of an Idiot to whom he pleases, without Account (c) ; the Grant of the Person coupling an Interest and a Trust, it descends to the personal Representative of the Grantee (d). In Cases of Lunacy it is otherwise ; the Grantee has no Interest, but an Estate during Pleasure ; he can make no Leases, nor can he incumber the Lunatic's Estate ; he cannot present to a vacant Benefice, in short, he takes nothing to his own Use, but must account to the Lunatic, or his Representatives (e).

This Branch of the Prerogative is generally, though not necessarily, exercised by the Person or Persons having the Custody of the Great Seal, to whom it is delegated by Warrant under the Sign Manual, countersigned by the two

(a) 2 Ves. j. 588.

(d) 2 Mod. 44.

(b) 17 E. 2. c. 9.

(e) 1 Woodes. 409.

(c) 8 Rep. 170. Moor, 4.

Secretaries of State; but the Warrant confers no Jurisdiction, only a Power of Administration, and if that Power be abused, or any erroneous Orders be made under it, as it is derived under the Sign Manual, the Appeal is to the King in Council (*a*), and not to the House of Lords. And it should seem that the Jurisdiction which the Chancellor has generally, or perhaps always exercised in these Cases, is not necessarily annexed to the Custody of the Great Seal, for it has been delared by the House of Lords, "that the Custody of Idiots and Lunatics was in the Power of the King, who might delegate the same to such Person as he should think fit (*b*)."
 And upon every Change in the Persons of the Lord Chancellor, the Lord Keeper, or Commissioners for the Custody of the Great Seal, a special Authority under the Sign Manual of the King is granted to the Person or Persons newly appointed (*c*); and therefore no Application in Matters of Lunacy can be heard by the Master of the Rolls, sitting at the Rolls: when, indeed, he sits in Court for the Lord Chancellor, it has been said that he has Jurisdiction. This Power seems to have been exercised in the Court of Chancery prior to the Erection of the Court of Wards, which was established by 32 Hen. 8. c. 4. A. D. 1540, and upon the Abolition of that Court by the 12 Car. 2. A. D. 1660, reverted to the Court of Chancery (*d*). And that Court will exercise it where the Person of the Lunatic is amenable, but the Property is out of the Jurisdiction (*e*). A Commission of Lunacy may be issued against a Person resident *Abroad*, and executed in the County in England, where the Mansion-House lays. The Commissioners cannot act under the Commission without the Introduction of a Jury, and therefore the Commission cannot be executed in foreign Parts (*f*).

(*a*) 2 Ves. j. 7. 72. 3 Atk. 635.
 6 Br. P. C. 329. 3 P. Wms. 104.

(*b*) 14 Feb. 1726. Dom. Proc.

(*c*) 1 Bl. Com. 303. Christian's Notes. 3 Dick.

(*d*) 2 Atk. 553.

(*e*) Ambl. 80.

(*f*) Ambl. 109. 112. 2 Ves. 401.

And a Person found Lunatic by a competent Jurisdiction abroad, may be so considered here (a). A Lunatic Subject residing abroad, or carried thither, may be found such by Proof in England; and a Commission will be granted upon Affidavits as in Cases here; but an Inquisition in *England* will not warrant a Grant in *Ireland*, there must be a finding under the Great Seal of *Ireland* (b).

In the first Instance, the Person is usually placed in a State of Confinement by his Friends, and this is regulated by the Legislature; for by several Acts of Parliament, private Mad-houses are placed under strict and wholesome Regulations (c), which from the very great Abuses and cruel and barbarous Conduct of the Persons keeping them, and the atrocious Murders which the Report of the Commissioners to the House of Commons have brought to light, it became highly necessary for the Legislature to do, and requires further legislative Interference; although the Courts of Law have punished with great Rigour, where the Cases brought before them require exemplary Punishment (d).

If the Party continues in a State of Insanity, and his Condition in Life will enable his Friends to apply for a Commission of Lunacy, it is advisable, after all Hopes of Convalescence are over, to obtain legal Authority for the permanent Confinement of the Lunatic, and it should seem that a Commission of Lunacy would be granted upon the Application of a Creditor (e), or even of a Stranger, without Regard to the Motives of the Person applying for the Commission. Where the Lunatic was illegitimate, the Opposition made by the Mother had not sufficient Weight with the Lord Chancellor to refuse the Commission (f).

(a) 2 Ves. j. 587, 8.

(b) 1 Scho. and Lefr. 301.

(c) Stat. 14 Geo. III. c. 49.

19 Geo. III. c. 15. *made perpetual* by 26 Geo. III. c. 91.

(d) Fortesc. 166. and the

Coms. Report, 1816.

(e) 1 Collins, 377.

(f) 15 Ves. 112.

Paupers or Vagrants, and not Persons of Condition, are within the Provisions of the Statute 17 Geo. 2. c. 5. s. 20, and 48 Geo. 3. c. 96. s. 19, 20, enabling Justices of the Peace, as inferior Magistrates, to take care of Lunatics (a).

While a Question as to the Lunacy is pending, provisional Directions will be given, till a Determination has been made (b); and the Lord Chancellor will prevent the Removal of the Lunatic. *Lord King, C.* made an Order for a Messenger to stop a Lunatic upon the Road to Scotland (c). And where the Relations take Charge of the Person and Effects of the Lunatic, the Lord Chancellor will upon the Application of the Heir at Law for a Restitution, make a Provisional Order as to the Property, and direct an Attendance and Inspection of the Lunatic.

A beneficed Clergyman becoming Lunatic, does not thereby vacate his Living, so as to let in the Patron to present; but it should seem, that if the Duty be not supplied, the Church-wardens *ex officio*, may apply for a Commission of Lunacy, and with the Concurrence of the Bishop of the Diocese, may obtain a Sequestration, and employ a Curate of their own Nomination; or the Bishop, or perhaps the Arch-deacon, may appoint a Curate; to obviate which the Relations of the Lunatic should attend to the Duty of the Parish, and take particular Care that it be properly supplied (d).

Where the Property of the Lunatic is too small to bear the Expences of a Commission of Lunacy (which Lord Eldon, C. observed ought never to exceed 100*l.*) an Order has been made in a Cause Petition upon Affidavits without Reference for Payment of Dividends for the two next ensuing Quarters of a Year, with Directions to apply again by a short Petition, as the Court should know the State of Mind and Amount of the Fortune from Time to Time. And it was stated that there had been Instances before Lord

(a) 2 Atk. 51.

(b) 3 Atk. 635.

(c) Ambl. 82.

(d) Highm. 25. 1 Collins. 551.

Northington and Lord Thurlow of a Reference in similar Cases, where the Fund was too small to bear a Commission: in the last Case before Lord Thurlow, the Income was only 75l a Year (a).

To prevent a Commission of Lunacy issuing improvidently, a Caveat may be entered with Mr. Carr, the Secretary of Lunatics; and on hearing, a personal Attendance and Examination will be ordered (b). And if the Commission is to be executed in the Country, the supposed Lunatic may have Leave to give in a List of Commissioners in addition to those of the Person suing out the Commission (c). If the supposed Lunatic gives sound and rational Answers to the Questions regarding his Property and Substance, however weak he may appear as to his Knowledge of indifferent Matters, which do not relate personally to himself through apparent Imbecility, this will not support a Commission; however such Examination is not conclusive, it is open to future Applications, as where Imbecility of Mind in a great Degree proceeded from Epilepsy, and the Jury had found the Party not a Lunatic, and the Evidence and Result of the personal Examination were delivered to Lord Eldon, he directed two Physicians who had not been consulted, to advise with those who had, and to see the Evidence, and afterwards to find means of visiting the Party without alarming, for the Purpose of determining the State of Mind as to a Competency for the Management of her Concerns, for that it did not appear to his Lordship a Case of Insanity (d): for as the granting the Commission is *discretionary*, it is not always granted, although the Lunacy should be established. Lord Eldon has observed, there may be Cases, where the granting the Commission might for ever prevent a Cure (e).

The Commission having issued, it may be useful to observe that no Delay should be suffered in proceeding

(a) 4 Ves. 795.

(d) 8 Ves. 66.

(b) 2 Ves. 403.

(e) 18 Ves. 58.

(c) 2 Collins, 152.

to execute the Commission; keeping a Commission for any unusual Length of Time, might give rise to a Suspicion that it might be done for indirect and illegal Purposes; and upon a Representation to the Lord Chancellor, he might be induced to supersede the Commission with Costs, considering it a Contempt; it should be executed within a Month after it is issued.

In adducing Proof of Lunacy to the Commissioners and Jury, the Solicitor should bear in Mind, that Insanity is a Fact, an habitual Fact, a Disposition, a personal Affection of the Mind; that Evidence should be grounded thereon at the Execution of the Commission, and the Solicitor should regulate his Proceedings in the Lunacy accordingly. And where the Lunatic resides in the Country, the Course has always been to execute the Commission, where the Party resided at or near his abode (a), and has been so held by Lord Hardwicke; and that where the Mansion-House of the Lunatic was situated, has decided what was to be considered the Place of such Residence for executing the Commission. Lord Eldon said there might be Exceptions, but they must be strongly made out in Evidence by the Party contending for them (b).

The Commissioners and Jury have a Right to inspect the Person of the Lunatic, and examine him before them; they do not always cause him to be brought before them, unless a considerable Doubt be raised on the Evidence as to his Sanity; however they have a Right to insist upon it without the Order of the Lord Chancellor. And if the Persons in whose Custody he is, refuse to produce him, the Commissioners might adjourn, and upon Application to the Lord Chancellor he would censure the Persons detaining the Lunatic, and direct them to pay the Costs (c), and to produce him, and probably would commit them for a Con-

(a) Highm.

(c) 2 Ves. 401. Ambl. 111.

(b) 2 Ves. 201. Coop. 205. 1 P. Wms. 701.

tempt (a), or the Commissioner might make no Return, or return the Fact ; but the better Way would be to obtain an Order for the Production of the Lunatic ; but the Lunatic has a Right to be present at the Execution of the Commission, if he chooses (b).

And where Witnesses summoned by the Commissioners to attend the Execution of the Commission neglect or refuse to attend, the Lord Chancellor will make an Order upon them by Name to attend, for the Commissioners have the Power of summoning Witnesses as incidental to their Authority (c).

A Writ of *Habeas Corpus* may be issued to bring up the Lunatic, and a Return must be immediately made, or the Party refusing to obey the Warrant, will incur all the Penalties consequent upon a Disobedience, and the Person who has the Care of the Lunatic may be committed for refusing to produce him ; but Access to the Lunatic has been refused, unless applied for by a Person entitled to ask for it (d).

The Return to the Commission must be clear and unequivocal, as where a Commission has issued to inquire whether Walter Stradling was a Lunatic, or enjoyed lucid Intervals, so that he was incapable of governing himself and his Affairs : a Return, that he is from Weakness of Mind incapable, and has been so for a Number of Years, but how he became so they know not, is a bad Return ; or, that he is not always in his Senses like other Men, and that it arises from Fear and Provocation (e) ; or is not of sufficient Understanding to manage his own Affairs ; or not a Lunatic, but incapable of managing his Affairs. These are all void Returns, they do not find by express Words whether he was or was not a Lunatic : the general Words are of unsound Mind (f). And if the Return to an Inquisition of Lunacy

(a) 2 Ves. 405.

(d) 3 Burr. 1363.

(b) 12 Ves. 455.

(e) 3 Atk. 168, 169.

(c) 6 Ves. 784.

(f) 19 Ves. 285. 11 Ves. 445.

be, that he is an Idiot, there must be a new Commission. And it is to be observed that in all Cases there must be a clear and absolute finding, they cannot find an Inference only, without finding a positive Fact.

If the Return depart from the Direction of the Commissioners, it is void; yet if there are equivalent Words, it will not be such as to quash it, for it is not a Variance in the Words, but in the Sense and Meaning, that will avoid the Return.

It is not absolutely necessary to state whether the Person had lucid Intervals or not, a Return finding the Lunacy, omitting to state that Fact, is good (a), and cannot be objected to in Point of Form. But the better Way seems to be to state some Act of Lunacy, committed on a certain Day, and any lucid Interval since.

If there is any Misbehaviour in the Execution of the Commissions, the Court may quash it and issue a new Commission (b): but the Traverse of a Verdict under a Commission being the Right of the Party, cannot be refused, and prevents the Custody, and the allowing the Costs of the Proceedings: if a Lunatic is allowed to traverse, the Costs have been allowed, though not of Course (c).

When the Commission is executed and returned, the Care of the Person of the Lunatic is committed to some Person, Relation or Friend, and from thence termed a *Committee*: there is usually a Reference to a Master to approve of a proper Person to act as Committee.

The Objection, to appointing the next of Kin, entitled in Remainder to the real Estate upon the Death of the Lunatic, the Committee of his Person has been over-ruled for a great Length of Time (d); nor is it an Objection to appointing the next of Kin, because he will come in for a Share of the Personal Estate under the Statute of Distri-

(a) Highmore, 45.

(c) Coop. 108. 19 Ves. 280.

(b) 5 Ves. 450. 3 Atk. 6,
185. 1 Ves. and Bea. 57.

(d) 7 Ves. 591. 1 Collins,
207. 2 P. Wms. 262.

butions (a). The Committee of the Person is often appointed Committee of the Estate (b).

The Heir at Law is generally appointed Committee of the Estate of the Lunatic, he having an Interest in keeping the Estate in good Condition. And although not appointed Committee of the Person, yet in some Instances the Lunatic may reside with him. For wherethe Committee of the Person of the Lunatic had permitted the Lunatic to reside with his Uncle, his Heir at Law, who had been appointed Committee of his Estate for upwards of thirty Years, upon an Application by the next of Kin to remove the Lunatic, and to lessen the Allowance, the Lord Chancellor refused both, and declared that from the Length of Time in which the Uncle had showed the Lunatic the utmost Tenderness, he was the properest Guardian, and that the Allowance contributed to the Support of the Lunatic; and where no Creditor complains, the Comfort of the Lunatic is to be regarded, not the next of Kin (c).

The same Person may be appointed Committee of the Person and of the Estate: where a Brother applied to be Committee, and that a Receiver might be appointed of the Estate; the Heir at Law, who with the Petitioner were the only next of Kin, refusing, and not able to give Security, the Lord Chancellor appointed the Brother Committee of the Personal Estate, restricting him from receiving any Sums of Money part of the Lunatic's Estate, and referring it to the Master to appoint a Receiver, but not the Solicitor under the Commission (d).

Where the Property has been very small, a Committee of the Person and Estate of the Lunatic has been appointed, without Reference to the Master, and the Balances directed to be paid in, as received on Affidavit without passing the annual Account before the Master (e).

The Lord Chancellor in appointing to these Offices, is

(a) 2 P. Wms. 544, 638.

(b) 1 Collins, 256.

(c) 2 P. Wms. 263. 3 P.

Wms. 108, 110.

(d) Amb. 104. 1 Collins,

256. 2 Meri. 452.

(e) 3 Ves. and Bea. 127.

generally guided by the Principle of uniting Interest with Duty; and the utmost Attention and Regard is always had to any strong Aversion, however groundless and unaccountable, in the Mind of the Lunatic against the Person proposed to be Committee of the Person, and which is a Ground for the absolute Rejection and Removal of any Person proposed or appointed (*a*). And in the Appointment, the Relations, unless some specific Objection, are always preferred to Strangers: a Wife has been appointed Committee of the Person, not alone, but jointly with a Relation (*b*).

A Feme Covert may be appointed Committee of the Person of the Lunatic, though she be under the Power of her Husband (*c*). But a Grant of the Custody to Husband and Wife as next of Kin: upon the Death of one the Right is determined, the Grant being joint, and a mere Authority without Interest (*d*). The Custody of the Person committed to two Committees (*e*), has been found inconvenient, though sometimes done (*f*).

If the Persons in whose Custody the Lunatic is, refuse to deliver him to the Committee, they incur a Contempt, and may be committed; nor is a *Habeas Corpus* necessary, but may be had recourse to if considered as eligible (*g*).

A Committee becoming Bankrupt, has been held a sufficient Cause for his Removal (*h*); but the Custody of the Person will not be changed, if upon a Reference to the Master, he should find that it would be for the Comfort of the Lunatic to continue the Custody with the Bankrupt (*i*). And in regard to the Committee of the Person the Lord Chancellor is generally influenced as much or more by the Sex of the Lunatic, than by other Circumstances in the Appointment (*k*): and the next of Kin and Expectants are

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| (<i>a</i>) 2 P. Wms. 637. 6 Ves.
427. | (<i>f</i>) 1 Collins, 227. |
| (<i>b</i>) 18 Ves. 221. | (<i>g</i>) 12 Ves. 455. 1 P.
Wms. 701. |
| (<i>c</i>) 3 P. Wms. 111. n. | (<i>h</i>) 2 Ves. j. 2. |
| (<i>d</i>) Forr. 143. Prac. Reg.
Wy.Ed. 56. Eq. Ca. Abr. 853. | (<i>i</i>) 3 Ves. 2 Dick. 631. 1
Swanst. 531. |
| (<i>e</i>) 2 P. Wms. 638. | (<i>k</i>) 2 P. Wms. 635, 638. |

not to be considered; the Comfort and personal Conveniences of the Lunatic, according to his Circumstances, are to be regarded paramount to all other Considerations (*a*). And if he be married, his Wife will be appointed Committee of his Person, with an Allowance correspondent to his Estate and Condition in Life (*b*). Where a Lunatic had been tried for Murder, and acquitted on the Ground of his Lunacy, but ordered by the Judge to be detained under the late Act; Lord Eldon declined ordering him to be removed out of Gaol to a proper Receptacle for Lunatics, the proper Application being to the King in Council (*c*).

The Allowance for *Maintenance* is always liberal; as where a Wife was a Lunatic, and the Husband had the Custody, the Lord Chancellor, in giving Directions for taking an Account of her separate Estate against the Husband, ordered due Consideration to be had of the extra Expences of maintaining her (*d*). The Office of Committee of the Person is given for the Sake not of the Committee but of the Lunatic, and the Allowance is for the Purpose of attaching him to the Lunatic. Where it has been discovered that the proposed Committee had previously engaged to divide the Savings of the Allowance with another, that has been adjudged to be a Reason for rejecting the Proposal (*e*), for there is no Instance of an Allowance being made to a Committee for his Trouble (*f*): if, however, there is great Trouble in managing the Estates, the Committee may petition for an Increase of Maintenance, which operates as such, and there seems to be no Occasion to obtain a Report from the Master, to ground such an Application: the Lord Chancellor may, upon Petition, make the requisite Order (*g*).

(*a*) 1 Ves. j. 297.

(*b*) 10 Ves. 104.

(*c*) Coop. 54.

(*d*) 4 Bro. C. C. 409.

(*e*) 6 Ves. 428.

(*f*) 6 Ves. 802. Anon. 10 Ves. 104.

(*g*) Ambl. 78, 178.

A Master in Chancery is never appointed a Committee, upon the Consideration of public Policy ; for he might have to pass his own Accounts, and his Situation might influence the Mind of another Master (*a*).

The Grant to a Committee does not extend to the personal Representatives of the Committee, nor is it assignable (*b*), or devisable by Will (*c*).

The first Object and primary Consideration of the *Committee of the Person* is to provide for the Comfort and Maintenance of the Lunatic, which must be regulated by the Allowance ; and if the Situation and Circumstances of the Lunatic's Family require an Addition to the Allowance, the Committee must apply for it : he must on no Account deprive the Lunatic of the Comforts and Conveniences of Life ; he cannot extend the Allowance to any Part of the Lunatic's Family. It seems, however, that the Committee will be allowed for the Maintenance of the Lunatic's Son, and (*d*) the Interest of a Fund in Court belonging to the Husband in a State of imbecility has been ordered to be paid to the Wife, for the Maintenance of the Family (*e*). But on a recent Application for an Increase of Maintenance to provide for the Lunatic's *collateral Relations*, where the Master had apportioned the Allowance as it was probable the Lunatic would have done, if sane ; Lord Eldon considering the Proportion entirely in the Discretion of the Court, confirmed the Report as to the gross Sum allowed, but not as to the Apportionment (*f*).

Where a Wife has been Lunatic, in taking an Account of her separate Estate, the extra Expenses of the Family will be regarded (*g*).

The Committee of the Estate must give Security by two respectable Persons in double the Sum at which the Rents

(*a*) 6 Ves. 427.

(*b*) 1 Vern. 9.

(*c*) 2 P. Wms. 268.

(*d*) 1 Vern. 262.

(*e*) 4 Bro. C. C. 100. 409.

1 Collins, 296.

(*f*) 2 Meri. 99.

(*g*) 4 Bro. C. C. 409.

of the Estate and the Income of the Lunatic's Property are computed. The Attorney-General before whom the Bond to the King is entered into, will direct in what Sum the Security is to be given: to enable him to ascertain what is proper, a general Statement of the Lunatic's Property is laid before him, taken from the Inventory made out at the Execution of the Commission, supported by an Affidavit of the Truth of such Statement, and the Attorney-General directs the Amount of the Security to be taken accordingly (a). The Securities may be two or more Persons, and they must be approved of before they execute the usual Bond: and if the outstanding Estate is very considerable, so as to make it difficult to procure the requisite Securities, it may be found adviseable to reduce the Security, by calling in Part of the outstanding Estate, and investing the Money in the Court of Chancery, and thereby bringing the Security within reach of the proposed Sureties, and at a future Period it may be found convenient to relieve the Sureties in the heavy Sums they are engaged, by calling in the personal Estate, and so reducing the Bonds given by the Sureties, and taking other Securities; the Committee must regularly pass his Accounts before the Master, and pay over the Balances, or in Default, he will be ordered to pay Interest upon the Balances kept in his Hands, and he will be deprived of his Costs, and possibly discharged from his Committeeship (b). It is the bounden Duty of the Committee, as soon as he has passed his Accounts, to apply by Petition for Leave to pay into Court, the Balance remaining in his Hands, which is quite of Course. By the standing Orders of the Court (c), and generally by an Order in each Lunacy, the Committee is directed to pass his Accounts annually: and the Masters are to certify at the last Seal after Trinity Term every Year, the State of the Receiver's and Committee's Accounts in their Office. The Lord Chancellor refused Costs to a

(a) 1 Collins. 262, 3.

(c) Ord. Canc. Be. Ed. 453.

(b) 1 Ves. j. 156, 296.

Committee, who had passed his Accounts irregularly, taking the Accounts of several Years together (*a*). But where the Sum annually received by the Committees, did not exceed *8l. per Annum*, beyond the Maintenance, being of such small Amount; Lord Eldon ordered the same from Time to Time, when received by the Committees, to be paid into the Bank, the Amount to be verified by Affidavit of the Committees, that the Order directing the Committees to pass their Accounts annually should be dispensed with, and the former Maintenance be continued (*b*), and appointed new Committees without Reference.

No Costs are allowed to the Friends or Relations of a Lunatic in their Attendance before the Master to check the Accounts, although Notice is given to them for that Purpose (*c*).

Where a Committee of the Estate cannot be procured, or until a Committee be appointed, a Receiver must be applied for by Petition, with the usual Salary, upon giving Security to the Attorney-General, as a Committee; and it does not seem to be material whether he is called a Receiver or Committee (*d*). So where the Committee resides at a Distance from the Estate (*e*), or is infirm, or the Committee has not been intrusted with the Property, a Receiver has been appointed, but only when no other Person will act as Committee (*f*).

The Power of the Committee of the Estate is limited: it is his Duty to see that neither the Property, nor its Succession suffer any Change; he cannot grant Leases, nor in anywise incumber the Estate without the Order of the Lord Chancellor (*g*), even where the Income is sufficient for the Maintenance; but by Stat. passed the 23 Geo. 3. c. 75. s. 3, the great Seal is intrusted with the Care and Commitment of the Persons and Estates of Lunatics, in Eng-

(*a*) 1 Ves. j. 296.

(*d*) 10 Ves. 622.

(*b*) 3 Ves. and Bea. 127. 1

(*e*) 1 Collins, 59.

Collins on Lun. 196. 4 Ves.
795.

(*f*) 1 Collins, 257. 1 Ja.
and Wa. 639.

(*c*) 2 Ves. 25.

(*g*) 1 Vern. 262.

land and Ireland, and may order the Freehold and Leasehold Estates of Lunatics to be sold, charged, or incumbered, by Way of Mortgage or otherwise, as shall be found most expedient for raising such Sums as shall be necessary for Payment of their Debts, and for performing their Contracts or Engagements, and the Costs attending the same: and may direct the Committee to execute such Conveyance, and to procure such Admittance and Surrender of Copyhold Lands, as the Great Seal shall direct (*a*).

Under the Stat. 4 Geo. 2. c. 10, a Lunatic Mortgagee may be ordered to convey, but the Costs of the Committee of a Lunatic Trustee, conveying within the Statute, must be paid out of the Lunatic's Estate (*b*). And the Lunatic Trustee within the Statute must be without Interest or Duty to perform: where an Application was by a Creditor, having such an Interest, the Trust being to sell for Payment of Debts, was held not to be within the Act (*c*).

And by the 11 Geo. 3. c. 30, a Committee may, under the Authority of the great Seal, renew Leases upon Lives, the Fines upon such Renewal to be applied as the Lord Chancellor shall direct; so where the Lunatic has an Estate for Life, or other Estate, with Power of leasing for Lives or Years, the Power may be exercised by the Committee; and the Committee pays the Costs of the Inquiry, and the Lessee of the Lease (*d*). The Committee may surrender Leases, for the Benefit of the Lunatic, to the same Uses as the former Leases (*e*).

The Committee cannot present to a vacant Benefice, the Right of Presentation belongs to the Great Seal, which was asserted in the first Instance by Lord Talbot (*f*).

And although the Lord Chancellor will not order the personal Estate of a Lunatic to be turned into real Estate, yet there have been Applications for Leave to lay out Part

(*a*) 1 Ves. 298. 1 Ja. & Wa. 264.

(*d*) Dick. 748.

(*b*) Coop. 290. 3 V. & B. 150.

(*e*) 29 Geo. 2. c. 31.

(*c*) 3 Ves. and Bea. 149. 17

(*f*) 3 Bac. Abr. 295.

Ves. 383. 3 Swanst. 131.

of the personal Estate in Repairs and Improvements, and that has been allowed, if the Next of Kin, at that Time, do not oppose it, and such an Order, which it is always advisable to obtain (*a*), has been binding upon other Persons, although not consenting, but happening to be Next of Kin at the Death of the Lunatic, though not so at the Time of making the Order (*b*). The Residue of a Lunatic's Property, beyond his Debts, has been ordered to be invested in a Government Annuity upon the Master's Report that it was for his Benefit, but never upon private Security (*c*).

The Committee of the Estate may Work a Coal Mine upon an Estate charged with Mortgage Debts; it was deemed like cutting Timber, the Next of Kin had an Interest, the Heir had no Interest (*d*).

The Committee may exercise the same Power in regard to cutting Timber for Repairs, as any discreet Person who was the Owner of the Estate might do: and therefore, where Money had been laid out from the personal Estate in the Purchase of Timber for erecting Barns on the real Estate, it was ordered to be made good; for it appeared that this had been done merely with Regard to the Committee's own Interest in the Reversion, while there was on the Estate Timber proper for this Purpose (*e*).

Debts incurred by a Lunatic *before he was found such*, are valid, and may be sued for at Law, and his Person may be taken in Execution (*f*): the Living of a Clergyman may be sequestered (*g*), and Leasehold or other Property may be levied by the Sheriff, which the Lord Chancellor cannot prevent (*h*). So Agreements made while sane, must be specifically performed (*i*).

(*a*) 10 Ves. 104. 11 Ves.
397.

(*b*) 2 Atk. 414. 2 Ves. j. 590.
75. notis.

(*c*) 18 Ves. 285. 1 Cox. 132.

(*d*) 6 Ves. 128.

(*e*) 2 Atk. 407.

(*f*) 1 Collins, 376. 13 Ves.

(*g*) 14 Ves. 182.

(*h*) 8 Ves. 81.

(*i*) 1 Ves. 82.

If Timber be cut on the Lunatic's Estate, whether by Order of Court, or by the Committee, and afterwards approved by the Court, the Rule has been not to change the Property, if any Surplus remain, but to pay it to the Heir at Law. The Principle of all the Cases is, that where the Property of the Lunatic is concerned, the Court will not permit a wanton Change of the Circumstances of that Property to change the Rights of his Representatives at his Death: but the Court will support the Committee in doing it, where it is manifestly for the Lunatic's Benefit (*a*).

The general Rule is, as to the Application of the Property, that the Committee shall not be allowed for any Monies expended, without a previous Order, in Repairs or Improvements (*b*); though this Rule seems to have been in one Instance, not strictly adhered to (*c*).

The Statute authorizes the Transfer of Stock in the Name of the Lunatic or his Committee, but not if standing in the Name of another, as Administrator (*d*), or of a Lunatic under a judicial Proceeding in foreign Parts (*e*).

If the Lunatic should recover his Senses, he must apply to the Lord Chancellor by Petition to supersede the Commission; and this Application should be supported by Affidavits of the Physician who attended the Lunatic and others; the Physician should attend his Lordship, and the Lunatic will be ordered to attend in Person at the Hearing, for the Inspection of the Lord Chancellor and for Examination.

Lord Thurlow was of Opinion, that where Lunacy was once established by clear Evidence, the Party ought to be restored to as perfect a State of Mind, as he had before, and that it should be proved by Evidence as clear and satisfactory (*f*). But Lord Eldon has not concurred in that

(*a*) 4 Co. 127, a.

(*b*) 11 Ves. 398. 563.

(*c*) 10 Ves. 104. 6 Ves. 799.

(*d*) 36 Geo. 3. c. 90. 2

Meri. 112.

(*e*) 8 Ves. 816.

(*f*) 3 Bro. C. C. 444.

Proposition; something less, than the same Perfection of Mind, he thought would be sufficient (*a*).

The Marriage of a Person duly found a Lunatic, is by Stat. 15 Geo. 3. c. 30, made null and void, unless he be previously declared sane by the Lord Chancellor, or his Trustees. It seems, however, that although the Marriage is made void by the Act of Parliament, a Sentence of the Ecclesiastical Court should be obtained. Lord Eldon, upon an Application, by the Committee, for the Purpose of having the Opinion of his Lordship, as to taking any Steps in the Ecclesiastical Court, to have the Marriage of a Lunatic declared void, referred it to a Master to see what Proceedings ought to be taken; for that it occurred to him, that under the Royal Marriage Act, 12 Geo. 3. c. 11. declaring certain Marriages void, it has been thought necessary to have the Sentence of the Ecclesiastical Court (b).

The Death of the Lunatic before the Inquisition is taken, avoids all the Proceedings, and the Power of the Commissioners is at an End. After the Inquisition the Death of the Lunatic does not abate the Proceedings; an Order of Reference to the Master (*c*) may be prosecuted, and a Report made, and the Lord Chancellor may make an Order thereon (*d*). And the Heirs at Law and next of Kin must file their Bill to have the Property transferred, the Report in Matters of Lunacy, not being sufficient Authority whereon to ground a Decree (*e*).

Having premised thus much, it may be sufficient here to close these Observations, and to enter into the Practice, referring to the very learned Treatises upon the Subject (*f*) of Matters in Lunacy in detail.

The following Directions may be sufficient to convey to the Junior Branches of the Profession the requisite Infor-

(*b*) 11 Ves. 10.

(*e*) Dick. 553. 1 Ball and

(*b*) 1 Vcs. and Bea. 140. Bea. 297.

19 Ves. 289.

(*f*) Collinson on Lunacy,

(*c*) 3 Bro. C. C. 23.

Mad. Canc. Higmore, &c.

(*d*) Amb. 706.

mation for obtaining and prosecuting a Commission of Lunacy.

The Course of Practice is in the first Place to prepare a Petition, the Form of which may be taken from the following Precedent.

In the Matter of John Stevens, a supposed Lunatic.
To the Right Honourable the Lord High Chancellor of
Great Britain.

The humble Petition of William Stevens, the Brother
of the said John Stevens a supposed lunatic;

Sheweth,

That John Stevens, of Edgware, in the County of Middlesex, Esq. your Petitioner's Brother, now is, and hath for these Five Years last past, been so deprived of his Reason and Understanding, that he is rendered altogether unfit and unable to govern himself, or to manage his Affairs, as by the Affidavits hereunto annexed appears.

Your Petitioner, therefore, most humbly prays, that your

14th March, 1823.

Filing the Affidavit annexed,
let a Commission in Nature
of a Writ *de Lunatico In-*
quirendo issue to inquire of
the Lunacy of the above
named John Stevens directed
to Thomas Evance, Abraham
Moore, and William Welfit,
John Ware, and William
Phillimore, Esqrs. or any
three or more of them; and
let the said Commission be
executed in or near the Place

Lordship will be pleased to
order that a Commission in
Nature of a Writ *de Lunatico*
Inquirendo may issue, to inquire
of the Lunacy of the said John
Stevens, directed to such Per-
sons as your Lordship shall
think fit,

And your Petitioner will ever
pray, &c.

of the said supposed Lunatic's Abode; and let a Jury, of the County,
and of the Parish or Neighbourhood, where the supposed Lunatic
lives, be returned to inquire of the said Lunacy.

ELDON, C. .

An Affidavit in Support of this Petition should state
that Deponent knows and is well acquainted with the Lu-
natic, (how long, setting out the particular Time,) he has

Appointment of some Time and Place, which must be at or near the Residence of the Lunatic, to execute the Commission (a). The Commissioners' Warrant or Precept upon unstampt Paper, must be delivered to the Sheriff of the County where the Commission is to be executed, to summon a Jury for the Purpose, which is in the following Form :

“ By virtue of a Commission, in Nature of a Writ *de Lunatico Inquirendo*, under the Great Seal of Great Britain, bearing Date at Westminster, the 16th Day of February instant, to us whose Names are here-under written, and others in the same Commission named directed, to inquire whether John Stevens, of Edgeware, in the County of Middlesex, Esq. be a Lunatic or not. These are therefore to will and require you to cause to come and appear before us Twenty-four good and lawful Men of your County on Thursday, the 20th Day of this instant February, at Ten o'Clock in the Forenoon of that Day, at the House of Mary Perfect, situate at Edgeware in the Parish of Little Stanmore, in the said County, and known by the Name or Sign of The Cranes, and then and there upon their Oaths to enquire of the Lunacy of the said John Stevens, and of all such Matters and Things as shall be given them in Charge by virtue of the said Commission ; and hereof fail not at your Peril. Given under our Hands and Seals the 17th Day of February, in the fourth Year of the Reign of our Sovereign Lord George the Fourth, by the Grace of God of the United Kingdom of Great Britain and Ireland, King, Defender of the Faith, &c. And in the Year of our Lord 1824.

“ To the Sheriff of the County of Middlesex, his Deputy or Under-Sheriff.

“ Thomas Evance, L.S.
 “ Abraham Moore, L.S.
 “ William Welfit, L.S.

(a) 7 Ves. 264. 19 Vcs. 340. Coop. 205.

Indorsement, to be written on the Precept.

“The Execution of this Precept appears in the Paper hereunto annexed.

“Antony Brown, } Sheriff.”
 “John Key, }

The Panel to be annexed to the Precept.

“Middlesex. Names of the Jurors to inquire according to the Tenor of the Precept hereunto annexed.

“William Windale, of Harrow Wald, Esq.

“John Sayers, of the same, Esq.

“William Martin, of the same, Esq.

&c. &c.”

This Warrant is written on plain Paper, to which is affixed three Seals, and the Commissioners' Signatures thereto must be procured; (their Fee is One Guinea each) the Warrant must be left at the Sheriff's Office, with Directions to summon the Jury. The Under Sheriff will summon Sixteen or Seventeen respectable Freeholders to attend at the Place and Time mentioned in the Warrant; if Thirteen of them attend, it will be sufficient.

The Summons to compel the Attendance of Witnesses before the Commissioners and Jury, is in the following Form:

“By virtue of a Commission, in Nature of a Writ *de Lunatico Inquirendo*, under the Great Seal of Great Britain, bearing Date at Westminster, the sixteenth Day of February, in the fourth Year of the Reign of King George the Fourth, to us whose Names are hereunto written, and others in the same Commission named, directed to inquire whether John Stevens of Edgeware, in the County of Middlesex, Esq. be a Lunatic or not. These are to will and require you, that you personally be and appear before us at the House of Mary Perfect, commonly called and known by the Name or Sign of The Cranes, situate at Edgeware in the Parish of Little Stanmore in the

County aforesaid, on Thursday, the twentieth Day of February instant, by Ten of the Clock in the Forenoon of the same Day, and there upon your Oath to testify the Truth, according to your Knowledge, touching the Lunacy of the said John Stevens, and of all such Matters as shall be demanded of you by virtue of the said Commission. Hereof fail not at your Peril. Given under our Hands and Seals the 17th Day of February in the Year of our Lord 1824."

Make out as many Summonses, (written on unstamped Paper) as there are Witnesses, and procure them all to be signed and sealed by the Commissioners: this may be done at the Time of their signing the Warrant to the Sheriff. Keep Copies of each, and serve the Originals on the Witnesses, and give them Half-a-Crown each for Conduct Money, a Physician Two Guineas, or Money sufficient to bear their Expenses to the Place of Meeting. If it should be necessary to have a Warrant to produce the Lunatic at the Meeting, it may be in the following Form, with three Seals, and must be signed by the Commissioners; a Fee of One Guinea each is paid for signing it.

Warrant to produce the Lunatic.

By Virtue of a Commission in the Nature of a Writ *de Lunatico Inquirendo*, under the Great Seal of Great Britain, bearing date at Westminster the sixteenth Day of February instant, to us, whose Names are hereunto subscribed, and others in the said Commission named, directed, to inquire whether John Stevens of Edgeware in the County of Middlesex, Esq. be a Lunatic or not. These are therefore to will and require you to produce before us the said John Stevens at the Execution of the said Commission on Thursday the Twentieth Day of this instant February, at Ten of the Clock in the Forenoon of the same Day, at the House of Mary Perfect, situate at Edgeware in the Parish of Little Stanmore, in the County of Middlesex aforesaid,

known by the Name or Sign of The Cranes (*a*), there to be examined touching the Matters aforesaid. And you are to give him Notice accordingly, and also to any other Person or Persons who are Guardians of him, or Trustees of his Estate, that they may appear in his Defence, if they shall think fit. Given under our Hands and Seals this 17th Day of February in the fourth Year of the Reign of George the Fourth, by the Grace of God, of the United Kingdom of Great Britain and Ireland King, and so forth, and in the Year of our Lord, 1824.

To Timothy Potton, Esq. or such other Person or Persons as now have the said John Stevens in their Custody.

Thomas Evance, L. S.
Abraham Moore, L. S.
William Welfit, L. S.

These preparatory Measures having been taken for the Execution of the Commission, an exact Statement must be obtained of the Property of the Lunatic, and an Inquisition prepared for the Signature of the Commissioners and Jury.

The Inquisition is in the following Form :

Middlesex, to wit. An Inquisition taken at the House of Mary Perfect, situate at Edgware, in the Parish of Little Stanmore, in the County of Middlesex, and known by the Name or Sign of The Cranes, the twentieth Day of February in the fourth Year of the Reign of our Sovereign Lord George the Fourth, of the United Kingdom of Great Britain and Ireland, King, &c. before Thomas Evance, Abraham Moore, and William Welfit, Esqrs., Commissioners in his Majesty's Commission, in the Nature of a *Writ de Lunatico Inquirendo*, under the Great Seal of Great Britain, bearing Date at Westminster, the seventeenth Day of February instant, to them the said Commissioners and others in the same Commission named, directed to inquire amongst other things of the Lunacy of John Stevens, of Edgware, in the County of Middlesex, Esq. on the Oaths

(*a*) Or at or as near the Lunatic's Residence as can conveniently be.

of (*here name the Jury*) good and lawful Men of the said County, who, being sworn and charged on their Oath, say, that the said John Stevens is, at the Time of taking this Inquisition, a Lunatic, and does not enjoy lucid Intervals, so that he is not sufficient for the Government of himself, his Messuages, Lands, Tenements, Goods, and Chattels; and that he has been in the same State of Lunacy, from the 15th Day of June, 1815, (or for Six Years or thereabouts last past,) but how and by what Means he, the said John Stevens, so became a Lunatic, the Jurors aforesaid know not unless by the Visitation of God, and that the said John Stevens has not alienated any Lands or Tenements during his said Lunacy to the Knowledge of the said Jurors. And the Jurors aforesaid upon their Oaths further say, that the said John Stevens is possessed of (*here leave a Blank to state the Lunatic's Property: and any Arrcars of Rent. or Dividends of his Stock in the Public Funds, or any Interest on Mortgages or Bonds, the Amount should be stated ;*) and the said John Stevens is also possessed of a Quantity of Plate, of the Value of 269*l.* 8*s.* 6*d.* he is also possessed of Furniture, and a Library of Books which are of the Value of 689*l.* And also the Jurors aforesaid upon their Oath say, that William Stevens is the only Brother and nearer Heir of the said John Stevens, the said Lunatic, and that the said Lunatic is of the Age of fifty Years. In Testimony whereof, as well the said Commissioners as the Jurors aforesaid, to this Inquisition have set their Hands and Seals, the Day, Year, and Place first abovementioned.

Thomas Evance,
Abraham Moore,
William Welfit,

William Windale,
John Sayers,
William Martin, &c. &c.

This Inquisition must be copied fair on unstamped Brief Paper, Brief-wise, without Seals on the Paper Inquisition.

The Commissioners and Jury being met to execute the Commission, and being sworn, and Proclamation made, the first Commissioner will address the Jury, by reading

the Commission, explaining to them the purpose of their Attendance, and their Duty, and the Jury must be all sworn; the Solicitor then brings forward his Witnesses to prove the Lunacy, who are examined by him, the Commissioners, and Jury, as they see Occasion; and the Lunatic himself should be ready to be produced, if necessary: for he has a Right to insist upon being examined before the Commissioners and Jury, no other Person being present; Counsel may, and frequently do, attend the Meeting. If the Jury are satisfied of the Lunacy, the Solicitor then examines Witnesses to prove what Estate and Property the Lunatic is entitled to. The senior Commissioner, after the Evidence is gone through, usually sums up the Evidence, and charges the Jury with the Facts, after which, the Jury deliver their Verdict, and the Solicitor should then fill up the Blanks in the Inquisition, and it would be proper to read it over previous to the signing. The Inquisition is then signed by the Commissioners and Jury; as the Jury sign their Names, pay them a Guinea each, and the Commissioners their Fees, which are proportioned to their Trouble, and the Distance they have come; the Under Sheriff is usually paid the same Fee as the Commissioners, and the Fee of the summoning Officer is one Guinea.

The Inquisition is to be engrossed fair on Parchment, with a proper Stamp, and three Seals for the Commissioners affixed, who sign their Names against each Seal respectively, together with their Return, on the Back of the Commission, which is to be annexed to the Inquisition as follows: "The Execution of this Commission appears in the Schedule hereunto annexed." The Inquisition on Paper must be likewise signed. Pay the Commissioners one Guinea each. The Commission and Inquisition annexed, must be carried to the Petty Bag Office, in the Rolls Yard, within a Month after it has been executed (a), and left there, and an Office Copy thereof taken from thence.

(a) 1 Collins 140. Highm. 242.

A Petition must then be preferred for the Appointment of a Committee or Committees of the Person and Estate of the Lunatic, and for an Allowance for the Maintenance of the Lunatic. This Petition must be fairly engrossed, and may be in the following Form :

In the Matter of John Stevens, a Lunatic.

To the Right Honourable the Lord High Chancellor of Great Britain.

The humble Petition of William Stevens, the only Brother and Next of Kin of the said Lunatic, and also his nearer Heir ;

Sheweth,

That pursuant to your Lordship's Order of the twelfth Day of February last, made upon the Application of your Petitioner, a Commission in the Nature of a Writ *de Lunatico Inquirendo*, was awarded and issued, directed to certain Commissioners therein named, to inquire of the Lunacy of John Stevens of Edgeware, in the County of Middlesex, Esq. who is the elder and only Brother of your Petitioner.

That the said Commission hath since been duly executed, to wit, on the twentieth Day of February last past, before the major Part of the Commissioners in the said Commission named, and thereby it is found that the said John Stevens is a Lunatic, and does not enjoy lucid Intervals, so that he is not sufficient for the Government of himself, his Mesuages, Lands, Tenements, Goods, and Chattels, and that he has been in the same State of Lunacy, from the 15th Day of June, 1815. And it was by the said Inquisition further found, that the said John Stevens, the Lunatic, had not alienated any Lands or Tenements during his Lunacy to the Knowledge of the said Jurors ; and it was by the said Inquisition further found, that the said John Stevens was possessed of (*here state the Lunatic's Property.*) And the Jurors upon their Oath said that your Petitioner, William

Stevens, is the only Brother and nearer Heir of the said Lunatic, and that the said Lunatic is of the Age of Fifty Years.

That your Petitioner is very desirous that the personal Estate of the said Lunatic may be duly taken care of, in such Manner as is necessary and useful in Cases of this Nature.

That with a View to lessen the said Security, and for the Safety of the Estate of the said Lunatic, your Petitioner is desirous that the Stocks so standing in the Lunatic's Name, in the Books of the Governor and Company of the Bank of England, may be transferred to the Accountant-General of the Court of Chancery, in trust in this Matter.

Your Petitioner therefore prays your Lordship, that the Care and Custody of the Person and Estate of the said Lunatic may be granted to your Petitioner, William Stevens, he giving such Security as is usual in the like Cases, *and that your Petitioner may be ordered to transfer into the Name, and with the Privity of the said Accountant-General, in Trust in this Matter, the said Sums of 2968l. 12s. 2d. Consolidated three per Cent. Annuities, and 6128l. 9s. 4d. Reduced three per Cent. Annuities, so respectively standing in the Name of the said Lunatic, in the Books of the Bank, or that your Lordship will be pleased to make such further or other Order in the Premises, as to your Lordship shall seem meet.*

And your Petitioner shall ever pray,
&c.

Or the Petition may be in the following Form :

Petition to appoint a Committee of the Lunatic's Person and Estate.

In the Matter of John Stevens, Esquire, a Lunatic.

To the Right Honourable the Lord High Chancellor of Great Britain.

The humble Petition of Mary Stevens, the Mother of the said Lunatic ;

Sheweth,

That in pursuance of your Lordship's Order made in this Matter, bearing Date the twelfth Day of February last, made upon the Petition of William Stevens, the only Brother and Next of Kin of the said Lunatic, and also his Heir at Law, a Commission in the Nature of a Writ *de Lunatico Inquirendo*, issued, bearing Date at Westminster, the sixteenth Day of the said Month, to inquire, amongst other Things, of the Lunacy of the said John Stevens.

That by the Inquisition taken at Edgeware, in the Parish of Little Stanmore, in the County of Middlesex, on the Execution of the said Commission, bearing Date the twentieth Day of February, last past, it was amongst other Things found that the said John Stevens was then a Lunatic, and did not then enjoy lucid Intervals, so that he was not sufficient and competent for the Government of himself, his Messuages, Lands, Tenements, Goods and Chattels, and that he had been in the same State of Lunacy from the 15th Day of June, 1815, but how and by what Means he became Lunatic, the Jurors know not, unless by the Visitation of God.

That your Petitioner is desirous that a proper Person may be appointed under the Order and Authority of your Lordship, to take Care of the Person and Estate of the said John Stevens.

Your Petitioner therefore prays your Lordship that it
18th March, 1824.

Let it be referred to Mr. Stephen, one of the Masters of the High Court of Chancery, to inquire and certify who is or are the most fit and proper Person or Persons to be appointed Committee or Committees of the Person and Estate of the said Lunatic; and that the said Master do also inquire and certify who is or are the Heir at Law and Next of Kin of the said Lunatic; to whom let due Notice of attending the said Master be given; and after the said Master shall have made his Report, such further Order shall be made as shall be just.

ELDON, C.

may be referred to one of the Masters of the High Court of Chancery to inquire and certify who is or are the most fit and proper Person or Persons to be appointed Committee or Committees of the said Lunatic's Person and Estate, and the Sum proper for the Maintenance of the Lunatic, or that your Lordship will be pleased to make such further or other Order as to your Lordship shall seem meet.

And your Petitioner shall ever pray, &c.

The Petition must be supported by Affidavit of the Relationship of the Petitioner to the Lunatic, and left with Mr. Carr, the Secretary for Lunatics, (where all Petitions for any Purpose in Matters of Lunacy are answered) for the Lord Chancellor's Order thereon; when answered, the Order must be filed at the Office of the Clerk of the Custodies, and an Office-Copy thereof had from thence. And it may not be improper here to remark, that wherever a Transfer is directed, or the Order is wanted for any Purpose, at the Accountant-General's Office, the Order must be drawn up at the Register-Office, for which Purpose, a Duplicate of the Order is made by the Secretary of Lunatics, when he draws up the Order, and which concludes by directing that the Order be drawn up and entered by the Register of the said Court. The Order should be taken from the Secretary of Lunatics, or the Clerk of the Custodies, and left with Mr. Bird,* at the Register-Office, who will draw up the Order, which must be passed and entered there: and so

where Reports are to be acted upon at the Accountant-General's-Office, Duplicates must be taken; and the one filed in the Report-Office in Chancery, and the other with the Clerk of the Custodies.

The Lord Chancellor's Order, appointing the Committee, being made, the Grant of the Custody of the Lunatic's Person and Estate may then be obtained. An Affidavit of what Property the Lunatic is entitled to must be procured, and left with the Order and Office-Copy of the Commission and Inquisition, at the Office of Mr. Goddard, the Clerk of the Custodies, who files the same, and he also procures the Attorney-General's Directions respecting the Amount of the Security to be given by the Committee on taking the Grant, and he afterwards prepares the Bond and Affidavit of the Sureties of their Sufficiency, for which Purpose, the Names and Descriptions of two Persons as Sureties, must be left with him: all these Matters being settled, the Affidavit sworn to by the Sureties, before a Master in Chancery, and the Bond executed, and an Affidavit of the due Execution thereof being made, which the Solicitor generally procures to be done, and left at the Clerk of the Custodies' Office; he will make out the Grant, and procure the same to be sealed.

By the Statutes, there ought to be a Month between the Return of the Inquisition of the Grant and the Custody and Land, to enable Parties to come in and tender a Traverse, which may be tendered, at any Time, giving Security in two Years' Profits of the Lands (*a*).

Where the Lunatic is possessed of Property in the Funds, a Transfer to the Accountant-General should be made, for which Purpose a short Petition should be prepared, stating the Commission and Grant on finding the Stock, and praying a Transfer to the Accountant-General, and the Lord Chancellor will make the Order without any Attendance. See ante, p. 935

(*a*) 8 and 18 Hen. 6. 3 Atk. 7. 2 Ed. 6. 1 Collins, 169.

The Committee may then petition for a Maintenance for the Lunatic: the Petition should state shortly the issuing of the Commission, the Inquisition finding the Lunacy returned, the Grant of the Custody, and pray that it may be referred to one of the Masters of the Court of Chancery, to consider of what is proper to be allowed for the Maintenance of the Lunatic.

This Petition is left with Mr. Carr, and being answered, and the Order left at the Master's Office, a State of Facts, and Proposal for Maintenance, must be drawn up and left there, which must be supported by proper Affidavits, and the Master will require that a Scheme for the future Establishment of the Lunatic's House, if his Fortune is large, should be laid before him, in order that he may form his Opinion on the Propriety of the same, and the Sum required to support it.

When the Report is made, it must be filed with Mr. Goddard, the Clerk of the Custodies, and an Office-Copy taken, and a Petition must be prepared to confirm it; this Petition must be presented at Mr. Carr's Office, and will stand in the Paper of Petitions in Lunacy before the Lord Chancellor, and will come on to be heard in its Course; a Consent should be given for the Next of Kin, if necessary, and the Order upon hearing the Petition being made, will be drawn up by Mr. Carr, the Secretary of Lunatics, at whose Office the Solicitor must call for it, and if any Directions are required to the Accountant-General to make Purchases, Transfers, or Payments, the Order must be drawn up at the Register-Office, and the Duplicate filed with the Clerk of the Custodies, and an Office-Copy taken from thence.

By an Order of Court, the 15th of December, 1792, all Receivers and Committees of Lunatics are to pass their Accounts and pay their Balances once a Year, to be fixed by the Masters, who are to certify at the second Seal after Trinity Term, the State of the Receiver's and Committee's

Accounts in their respective Offices, and disallow the Salaries of those in arrear (a).

The Committee must petition for an Order to pass his Accounts : the Petition may be in the following Form :

In the Matter of John Stevens, a Lunatic.

To the Right Honourable the Lord High Chancellor of
Great Britain.

The humble Petition of William Stevens, of Edgeware, in the County of Middlesex, Esq., Committee of the Person and Estate of the said Lunatic ;

Sheweth,

That a Commission having issued to inquire of the Lunacy of the said John Stevens, he was, by Inquisition duly taken thereon, the twentieth Day of February, 1824, found to be a Lunatic, and that he was seised of, and entitled to the several Estates therein mentioned.

That in pursuance of your Lordship's Order made in this Matter for that Purpose, the Custody of the said Lunatic's Person and Estate was granted to your Petitioners, subject to account annually for the Rents and Profits thereof.

That your Petitioner, as Committee of the said Lunatic's Estate, hath received and paid divers Sums of Money on Account of the said Lunatic and his Estate, and is desirous to pass his Account thereof.

Your Petitioner, therefore humbly prays your Lordship

4th March, 1824.

Let it be referred to Mr. Stephen, to take the Petitioner's *further* Account of the said Lunatic's Estate *from the Foot of his last Account passed by the said Master*, and there-

that it may be referred to the Master, to whom this Matter is referred, to take and pass your Petitioner's Accounts of Receipts and Payments of the said Lunatic's Estate from the Time

(a) Ord. Canc. Bea. Ed. 461.

in to make him all just Allowances, and let due Notice of attending the said Master be given to such Person or Persons as would be entitled to a distributive Share of the said Lunatic's Estate, if he was dead Intestate.

ELDON, C.

he was appointed Committee thereof, and therein to make unto your Petitioner all just Allowances, and particularly an Allowance for his Costs of passing the said Accounts, and all other his Costs incurred in this Matter.

And your Pctitioner shall ever pray, &c.

It seems usual, by a particular Order in each Lunacy, to direct, that a Committee shall pass his Accounts *annually*. The Lord Chancellor refused Costs to a Committee, who had passed his Accounts irregularly, taking the Accounts for several Years together (a).

The Order being obtained from Mr. Carr, the Secretary's Office, the annual Accounts must be brought in before the Master, the Manner of doing which, and of passing the Accounts, differ in no wise from the passing of Executor's Accounts, explained in the former Sheets of this Work, where the young Practiser will find very full Instructions.

The following Forms of Petitions and Proceedings may be found of Use to the Practitioner, and are given, not as immediately connected with the several Bills of Costs here given, but as useful Precedents to be resorted to and brought into Use, as the various Occurrences to which they refer may arise.

(a) 1 Ves. j. 296.

Form of the Committee's Account to be passed before the Master to whom it is referred.

In the Matter of John Stevens, a Lunatic.

William Stevens Committee of John Stevens a Lunatic, his Account of the Rents and Profits of the said Lunatic's Estate, from Michaelmas, 1822, to Michaelmas 1823.

Arrears due, Mich. 1822.	Rents due, Mich. 1823.	Tenants Names, &c.	Sums Received.	Arrears remaining due at Mich. 1823.
£ s. d.	£ s. d.	In the Parish of Edgware, County of Middlesex.	£ s. d.	£ s. d.
14 5 0	28 0 0	Mary Perfect - -	42 5 0	
		In the Parish of Walkern, Herts.		
	210 0 0	Henry Jones, Esq.	100 0 0	110 0 0
20 0 0	40 0 0	Thomas Nicholls	40 0 0	20 0 0
30 0 0	60 0 0	Ann Griffiths - -	60 0 0	30 0 0
40 0 0	80 0 0	John Daniel - - -	80 0 0	40 0 0
104 5 0	418 0 0		322 5 0	200 0 0

Disbursements on the foregoing Estate for the Years 1823 and 1824, and paid by the said Committee.

		£ s. d.
No. 1. (a)	To Arthur Gardiner's Bill for Taxes for 1823 and 1824	- - 14 0 6

(a) Refers to the Voucher numbered.

AND REMARKS.

943

	£	s.	d.
Brought forward	14	0	6
No. 2. Paid Thomas Humphreys, two Years Chief Rent, due to Charles Edwards	0	8	0
3. Paid Richard Wynne, for Repairs and Straw - - -	3	17	0
4. Paid Edward Thomas, ditto, and Allow- ance for Lime - - -	4	3	9
5. Paid Edward Bowers, a Church Ley	0	12	1
6. Paid David Hugh, a Bill for carrying Corn, &c. - - -	2	7	6
	<u>25</u>	<u>8</u>	<u>10</u>

Sundry other Disbursements on Account of the foregoing Estate paid by the said Committee. And also of Monies due to him for the Maintenance of the said Lunatic from Midsummer, 1823, to Michaelmas, 1824.

	£	s.	d.
No. 7. Paid Agent's Salary for one Year, end- ing Michaelmas, 1823 -	10	9	0
8. Paid Mr. Glynn, in full for Interest on £400 to 27th July, 1823, as per Ac- count, stated and settled -	29	10	4
9. Paid Richard Whittington, the Hostler at the Swan Inn, at Stevenage, Herts, for Horse Hire for the Lunatic	2	8	3
10. Paid William Whittington, a Post Boy at the same Inn, for the Hire of a Chaise for the Day for the said Lunatic	1	3	10
11. Paid Mr. Thomas Whittington, a Bill for Sundries, furnished to the said Lunatic, at the Swan Inn aforesaid -	0	18	6
12. Paid Mr. Wm. Wilshire, an Attorney, the Expenses of his Journey to London and back - - -	10	0	0
Carry forward	<u>54</u>	<u>9</u>	<u>11</u>

	£	s.	d.
Brought forward	54	9	11
Due to the Committee for Maintenance from Midsummer 1823, to Michaelmas 1824, at £200 per Annum . - - - -	250	0	0
	304	9	11
Disbursements for the Year 1823	25	8	10
	329	18	9
Total Payments -	322	5	0
Total Receipts -			
Balance due to the Committee	7	13	9

The Committee's Account must be verified by Affidavit, for which the following Form may serve.

In the Matter of John Stevens, a Lunatic.

William Stevens, Committee of the Person and Estate of the said John Stevens the Lunatic, maketh Oath, and saith, that the Account hereunto annexed, marked with the Letter A., doth contain to the best of this Deponent's Knowledge and Belief, a just and true Account of all such Sum and Sums of Money, as have been received by this Deponent, or any other Person or Persons by his Order or for his Use, out of or on Account of the said Lunatic's Estate, from Michaelmas 1823, (*the Time to which this Deponent passed his last Account as Committee as aforesaid*) to Michaelmas 1824. And that to the best of this Deponent's Knowledge or Belief he has not within that Time received any other or further Sum or Sums of Money out of or on Account of the said Estate than what are mentioned or set forth in the said Account. And this Deponent further saith, that the several Sums of Money therein mentioned to be paid or allowed have been really and *bonâ fide* paid or allowed by this Deponent. (And this Deponent saith, that in the said Account is

contained a true Rental of the said Lunatic's Estate, to the best of this Deponent's Knowledge and Belief, from the said Michaelmas, 1823, to Michaelmas, 1824, inclusive; and also a true Account of all Rents due and in arrear, for the said Lunatic's Estate at Michaelmas, 1824. And this Deponent saith, that there is no Error, Omissions, or wrong Charge whatsoever in the said Account, to the Knowledge or Belief of this Deponent.

Sworn, &c.

William Stevens.

The following Forms of Petitions to vacate the Recognizance entered into by the Committee, or to supersede the Commission, may be found useful.

In the Matter of John Stevens a Lunatic.

To the Right Honourable the Lord High Chancellor of Great Britain.

The humble Petition of William Stevens, the Committee of the said Lunatic's Estate;

Sheweth,

That a Commission having issued to inquire of the Lunacy of the said John Stevens, he was, by an Inquisition duly taken thereon, the 20th Day of February, 1822, found to be a Lunatic, and that in pursuance of an Order made for that Purpose a Grant of the Custody of the said Lunatic's Estate to your Petitioner passed the Great Seal on the 18th Day of May, 1822, and that your Petitioner from that Time to the Death of the said Lunatic in March last, acted as such Committee of the said Lunatic's Estate and passed all his Accounts before the Master to whom this Matter stands referred, and that on the final Account taken before such Master there was stated to be a Balance of 1648*l.* 14*s.* 8*d.* due from your Petitioner as Committee aforesaid.

That Part of such apparent Balance consisted of an annual Payment of 230*l.* 3*s.* 8*d.* made by your Petitioner to Mr. George Allan, of Grange near Darlington, Attorney

at Law, as Interest due to him from the said Lunatic on the Sum of 4600*l.* and which annual Payment was so made at the express Desire of the said Lunatic's Wife and all his Next of Kin, who would have been entitled to a distributive Share of his Personal Estate on his Decease, the same having for a great Number of Years been paid by the said Lunatic himself previous to his Lunacy, and Receipts taken by him from the said George Allan, expressing it to be for such Interest Money, but the said George Allan not being able to produce regular Securities for the said 4600*l.* the Master did not conceive himself sufficiently authorized to allow such Payments as Interest for the same in your Petitioner's Accounts, without the Consent of all the Next of Kin and Representatives of the said Lunatic, and that such annual Payments of 230*l.* 14*s.* 8*d.* were accordingly disallowed by the said Master.

That by your Lordship's Order made in this Matter on the 20th Day of August last, it was among other Things ordered that the several Sums of 230*l.* 14*s.* 8*d.* and 230*l.* 14*s.* 8*d.* and 189*l.* 5*s.* before disallowed by the said Master, should be allowed to your Petitioner; and also the several Sums of Money advanced and paid by him to or for the Use and Benefit of those Branches of the Family of the said Lunatic who were his legal Representatives or Legatees under his Will; and that it should be referred to the Master to tax the Costs of all Parties since the last Taxation, and particularly the Costs of Thomas Stevens, the Lunatic's Nephew, omitted to be taxed as therein mentioned. And that what shall be reported due for such Costs be paid by your Petitioner out of the said Sum of 1648*l.* 14*s.* 8*d.* reported to be in your Petitioner's Hands belonging to the said Lunatic's Estate. And it was thereby further ordered that the said Master should take an Account of the several Sums of Money paid by your Petitioner for or on Account of the Interest of the said Sum of 4600*l.* due to the said George Allan; and also the several Sums of Money advanced and paid by your Petitioner to or for the

Use and Benefit of those Branches of the Family of the said Lunatic who were his legal Representatives or Legatees under his Will, and that the said Master should allow the same respectively with the Costs aforesaid unto your Petitioner. And it was thereby further ordered that what the said Master should find to be due from your Petitioner in respect of the said Sum of 1648*l.* 14*s.* 8*d.* (after the several Deductions aforesaid) should be paid by him into the Bank, in the Name and with the Privity of the Accountant-General of this Court, in trust in this Matter, who was to declare the Trusts thereof accordingly, subject to the further Order of your Lordship.

That in pursuance of your Lordship's said Order, the said Master hath taken an Account of the several Sums of Money so paid by your Petitioner for or on Account of the Interest of the said 4600*l.* due to the said George Allan, and hath allowed him the said several Sums of 230*l.* 14*s.* 8*d.* and 230*l.* 14*s.* 8*d.* and 189*l.* 5*s.* 2*d.* so by him the said Master before disallowed as aforesaid, amounting together to the Sum of 649*l.* 12*s.* 4*d.* and the said Master hath also taken an Account of the several Sums of Money advanced and paid by your Petitioner to or for the Use and Benefit of those Branches of the Family of the said Lunatic, who were his legal Representatives or Legatees under his Will, amounting to the Sum of 489*l.* 5*s.* 2*d.*

That the said Master hath also taxed the Costs of all Parties since the last Taxation, and particularly the Costs of the said Thomas Stevens, the Lunatic's Nephew, omitted to be taxed as aforesaid, amounting together to the Sum of 89*l.* 12*s.* 10*d.* which said Sums of 649*l.* 12*s.* 4*d.* and 489*l.* 5*s.* 2*d.* making together the Sum of 1138*l.* 17*s.* 6*d.* the said Master hath allowed to your Petitioner, and which is to be retained by him out of the said Sum of 1648*l.* 14*s.* 8*d.* (the Balance remaining in your Petitioner's Hands on passing his final Account before the said Master as Committee of the said Lunatic's Estate) and the Sum of 89*l.* 12*s.* 10*d.* being deducted from the said Sum of

1648*l.* 14*s.* 8*d.* leaves the Sum of 420*l.* 4*s.* 4*d.* which the said Master found to be due from your Petitioner, and was by him to be paid into the Bank, in the Name of the Accountant-General of this Court, pursuant to the Directions of your Lordship's said Order, as by the said Master's Report, bearing date the 14th Day of November last, will appear.

That your Petitioner in obedience to your Lordship's said Order, and pursuant to the said Master's Report, hath accordingly paid into the Bank in the Name of the said Accountant-General the said Sum of 420*l.* 4*s.* 4*d.* in trust in this Matter, as by the said Accountant-General's Certificate will appear.

Your Petitioner therefore prays your Lordship that the Bond or Recognizance entered into by him on the 18th Day of June, 1823, for your Petitioner's duly accounting before the said Master for all Monies received by him as Committee of the said Lunatic's Estate, may be vacated and delivered up to him.

And your Petitioner will ever pray, &c.

Form of Petition to supersede Commission of Lunacy.

In the Matter of William Bevan, Esq.

To the Right Honourable the Lord High Chancellor
of Great Britain.

The humble Petition of the said William Bevan;

Sheweth,

That pursuant to an Order, dated the 7th Day of October, 1809, made on the Application of your Petitioner's Sisters, Margaretta Maria Bevan, Amy Bevan, and Sage Bevan, a Commission in the Nature of a Writ *De Lunatico Inquirendo*, on the 3d Day of November, 1809, issued against your Petitioner.

That the said Commission was executed on the 13th Day of December, 1809, and by the Inquisition then taken thereon, it was found that your Petitioner was at the Time of taking the said Inquisition a Lunatic, and that he had been so since the 20th Day of December, 1806, and that he was entitled in Possession to several Messuages, Lands, Tenements, and Hereditaments therein particularly mentioned, amounting in the whole to the yearly Rent of 336*l.* 2*s.* 6*d.* and in Reversion to several other Messuages, Lands, Tenements, and Hereditaments, amounting together to the yearly Rent of 59*l.* 12*s.* And that he was entitled to a Personal Estate, consisting of the Particulars therein mentioned, being together of the Value of 94*l.* 7*s.* or thereabouts. And that your Petitioner's said Sisters were his nearer Heir.

That pursuant to an Order, dated the 13th of January, 1810, the Custody of your Petitioner's Person and Estate was by Letters Patent, under the Great Seal of Great Britain, bearing date the 26th Day of June, 1810, granted to your Petitioner's said three Sisters, Margaretta Maria Bevan, Amy Bevan, and Sage Bevan.

That your Petitioner's said Sisters, Amy Bevan, and Sage Bevan, are since dead, and your Petitioner's surviving Sister, the said Margaretta Maria Jones, Widow, who intermarried with George Jones, Esq. since deceased, and Ann Coke, an Infant, the only Child of your Petitioner's said late Sister Amy Bevan, who married Mr. George Coke, are now your Petitioner's only Next of Kin.

That your Petitioner hath for several Years last past lived and resided, and now does live and reside at his own House called Penycoed in the County of Carmarthen with his said surviving Sister Margaretta Maria Jones.

That your Petitioner, by the blessing of God, hath recovered from his Indisposition of Mind, and for a considerable Time last past hath been and now is very capable of taking care of himself and managing his Estate and Affairs.

Your Petitioner therefore humbly prays your Lordship that the said Commission, Inquisition and Letters Patent, may be superseded and determined, or that your Lordship will make such other Order for your Petitioner's Relief, as to your Lordship shall seem meet.

And your Petitioner shall ever pray, &c.

Form of a Petition to the Lord Chancellor or some One of the Chief Justices of either Bench, for an Order to inspect a licenced Mad House, upon the Suggestion of Ill-treatment and unnecessary Detention of a Patient there.

To the Right Honourable the Lord High Chancellor of Great Britain.

The Humble Petition of Charles Pilgrim of Abbot's Langley in the County of Hertford;

Sheweth,

That Giles Pilgrim, the Father of your Petitioner, having been reputed to be in a State of Lunacy, and proper to be received into a House Licensed for the Reception of Lunatic Patients, under the Statute of the 14 Geo. III. c. 49, was on or about the 12th Day of March, 1819, pursuant to your Petitioner's Direction in Writing, and by an Order under the Hand and Seal of Mr. Charles Pellet of St. Alban's in the said County, a Licentiate under the Royal College of Physicians, London, both bearing Date respectively, on or about the 5th or 6th Days of March, 1819, conveyed to and received into the House kept for that Purpose by William Welch, Doctor in Physic, situate at Brachwood Green, in the Parish of King's Walden, in the County of Hertford, where he is yet confined.

That no Commission of Lunacy has been issued in this Case, as the said Giles Pilgrim hath not any Estate

of Inheritance, or Personal Estate, but doth depend solely for Support and Maintenance upon your Petitioner.

That a very considerable Expence hath been already incurred to your Petitioner in medical Advice and Assistance, and in the present Maintenance of the said Giles Pilgrim.

That during the first three Months of his Confinement in the said House your Petitioner and his Wife had ready Access to him frequently, and were advised to entertain Hopes of his Recovery, but since that Period, all such Access has been denied to them by the said Doctor Welch, or by his Agents.

That your Petitioner has regularly paid to the said Doctor Welch the whole of his Demand every Week up to the 21st of April last.

That your Petitioner hath Reason to believe, and hath been credibly informed that' (here the ill Usage and barbarous Treatment of the Lunatic should be set out, and the Causes of Complaint fully detailed, Instances of which may be found in the Report of Mad Houses, by the Committee appointed by the House of Commons) or that the said Giles Pilgrim hath recovered since his Residence in the said House, sufficiently to be able to return Home. And that by the kind Attentions and Treatment which would be given to him in your Petitioner's Family there is the greater Reason to infer that his Recovery would be completed more readily than by his remaining for any longer Time in the said House.

That your Petitioner has good Ground to believe that the said Doctor Welch, or his Agents, hath persisted in refusing Access to the said Giles Pilgrim, in order to conceal his progressive Recovery for sinister Purposes.

Your Petitioner therefore most humbly prays that your Lordship would be pleased to order that the Commissioners appointed by the said Act, or any three or more of them (or if in the Country, " the Justices of Peace and

Physician appointed at the General Quarter Sessions held at Hertford, in and for the County of Hertford, on the 6th Day of January, 1818, for the Purposes of the said Act or any two of them") may visit and inspect the aforesaid House licensed for the Reception of Lunatics at Brachwood Green aforesaid, in the Parish of King's Walden aforesaid, and that they may be ordered to report to your Lordship all the several Matters hereinbefore set forth, and such further and other Matters as they shall think deserving of your Lordship's Notice; and that your Lordship will be pleased to order that the Registry kept by the said Commissioners, or their Secretary, at the Royal College of Physicians of London, of all Reports, Matters, and Things, touching the said licensed House may be laid before your Lordship for Inspection.

And that your Lordship would be pleased to grant to your Petitioner such further and other Relief in the Premises as the Nature of the Case requires, and as to your Lordship shall seem meet.

This Petition must be supported by Affidavits of the Facts, sworn before a Master in Chancery, or in the Country, before a Master Extraordinary. And if the Application be made to the Lord Chancellor, they must be left with Mr. Carr, the Secretary of Lunatics, who will draw up the Order; or if the Application be made to either of the two Chief Justices of the King's Bench or Common Pleas, the Petition must be left with the Clerk at Chambers, and the Order drawn up by him, and put in force as directed in executing similar Orders in Lunacy, observing that this is not a Proceeding in the Court of Chancery, and the Order should be served personally if it can be done.

BILL OF COSTS

FOR

A PLAINTIFF IN AN INJUNCTION CAUSE.

IN CHANCERY.

Rose Beckford, PLAINTIFF.

and

Joseph Darton, DEFENDANT.

EASTER TERM, 1823.

	£	s.	d.
TAKING Instructions for Bill - -	0	13	4
Drawing Bill, and fair Copy, fol. 60 (a)	3	0	0
Fee to Mr. Maddock to settle and sign same, and			
Clerk - - - -	2	4	6
Attending him - - - -	0	6	8
Engrossing Bill - - - -	1	10	0
Paid for Parchment and Duty - -	0	18	0
Paid filing same - - - -	0	7	4
Paid for Subpœna - - - -	0	8	0
Service thereof (b) - - - -	0	2	6
The Defendant having appeared, but not having			
put in his Answer, nor obtained any Order for			
Time, paid for an Attachment - -	0	12	2
Instructions for Counsel to move for an Injunc-			
tion to stay Proceedings at Law - -	0	2	6
Fee to Mr. Maddock to move - - - -	0	10	6

(a) The fair Copy is included in the 1s. for Drawing.

(b) Personal Service in Town 5s. in the Country 10s.; if only one Defendant, personal Service is not allowed.

954 BILL OF COSTS FOR A PLAINTIFF

	£	s.	d.
Attending him, and Register to draw up and enter Order - - -	0	6	5
Paid for Order, Entry, and Service -	0	8	0
Paid for Writ of Injunction -	1	14	10
Copies, and Service thereof on the Defendant and his Solicitor - - -	0	8	0
Drawing Notice, that Injunction might extend to stay Trial, Copy, and Service -	0	4	0
Instructions for Affidavit in Support of the Motion	0	6	5
Drawing the same and fair Copy, fol. 16	0	16	0
Attending, reading over and settling same	0	6	8
Engrossing same - - -	0	7	7
Paid Oath - - - -	0	1	0
Paid filing, and for Office Copy -	0	16	0
Abbreviating Bill, and Affidavit, fol. 75	1	5	0
Making Copy thereof for Counsel, five Brief Sheets - - -	0	16	8
Gave Mr. Maddock therewith and Clerk	2	4	6
Attending him - - -	0	6	8
Drawing Affidavit of the Service of Notice, En- grossing, and Oath - - -	0	7	7
Paid filing, and for Office Copy -	0	6	7
Attending Court, Injunction granted (a)	0	13	4
Paid for Injunction - - -	2	1	6
Copies, and Service thereof on the Defendant and his Solicitor - - -	0	10	0
Term Fee, Clerk, and Solicitor -	0	16	8
Letters and Messengers - - -	0	5	0

TRINITY TERM, 1823.

Paid for Office Copy, Answer, fol. 54 -	3	3	0
Making Close Copy thereof (b) -	0	9	0

(a) An Attendance is always allowed where an Affidavit, or any Deed, &c. is to be read in Court, and by the late Orders on Special Motions, 13s. 4d. each day.

(b) Not allowed in Town Causes.

IN AN INJUNCTION CAUSE.

955

	£	s.	d.
Abbreviating same - -	0	18	0
Making a Copy thereof for Counsel, five Sheets	0	16	8
Fee to Mr. Maddock, with Brief, to shew Cause against dissolving Injunction, and Clerk	3	5	6
Attending him - - -	0	6	8
Attending Court on Motion, when the Injunction was dissolved - -	0	13	4
Term Fee, Clerk, and Solicitor -	0	16	8
Letters and Messengers - -	0	5	0

EASTER VACATION, 1824.

The Defendant having obtained a Dismissal of the Bill for Want of Prosecution, paid for a Copy of his Bill of Costs, fol. 12 -	0	6	0
Attending taxing the same, Clerk in Court and Solicitor - - -	0	13	4
Term Fee, Clerk, and Solicitor -	0	16	8
Letters and Messengers -	0	5	0

BILL OF COSTS

FOR THE

DEFENDANT IN THE SAME CAUSE.

IN CHANCERY.

Rose Beckford, PLAINTIFF,

and

Joseph Darton, DEFENDANT.

EASTER TERM, 1823.

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Attending and taking Instructions to appear - -	0	6	8			
Drawing Warrant to defend, and Stamp - -	0	7	6			
Paid entering Appearance -	0	6	8			
Paid for Office Copy Bill, fol. 60	3	10	0			
Attending, taking Instructions for Answer - -	0	13	4			
Drawing same, and fair Copy, fol. 54 - -	2	14	0			
Fee to Mr. Roupel, to settle and sign same, and Clerk -	2	4	6	0	2	6
Attending him - -	0	6	8			
Term Fee, Clerk in Court, and Solicitor - -	0	16	8			
Letters and Messengers -	0	6	0	0	1	0

TRINITY TERM, 1823.

Attending Defendant reading over Answer as settled by Counsel	0	13	4			
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BILL OF COSTS, &c.

957

	CHARGE.			TAX OFF.		
	£	s.	d.	£	s.	d.
Engrossing Answer -	1	7	0			
Paid for Parchment and Duty, two Skins - -	1	8	0	0	9	0
Attending Defendant, reading over Engrossment -	0	13	4			
Attending him to the Public Office to get him sworn thereto	0	6	8			
Paid Oath - -	0	1	0			
Paid filing Answer - -	0	3	4			
Instructions for Counsel to move for Order to dissolve Injunction, un- less Cause shewn -	0	2	6			
Fee to him to move - -	0	10	6			
Attending him, and Register to draw up and enter Order -	0	6	8			
Paid for Order, Entry, Copy, and Service - -	0	9	0	0	0	6
Drawing and engrossing Affidavit of the Service thereof, Duty and Oath	0	7	7			
Paid filing same, and for Office Copy	0	6	1			
Abbreviating Bill, and Answer, fol. 60, 54—114 - -	1	18	0			
Two fair Copies thereof for Counsel, ten Sheets each - -	8	6	8			
Two Copies of the Order Nisi an- nexed - - -	0	1	0			
Fee to Mr. Solicitor General and Clerk, with Brief to move to dis- solve Injunction, the Plaintiff shewing Cause against the same on the Merits - -	5	7	6			
Attending him - -	0	6	8			
Fee to Mr. Roupel and Clerk, with Brief - - -	3	5	6	0	2	6
Attending him - -	0	6	8			

	CHARGE.			TAX. OFF.		
	£	s.	d.	£	s.	d.
Attending Court, when the Injunction was dissolved -	0	13	4			
Paid for Order, Entry, Copy, and Service - -	0	9	0	0	0	6
Term, Fee, Clerk, and Solicitor	0	16	8			
Letters and Messengers -	0	6	0	0	1	0

EASTER TERM, 1824.

Six Clerks' Certificate of the Pleadings being filed -	0	3	4			
Instructions to move to dismiss Bill for Want of Prosecution	0	2	6			
Fee to him to move -	0	10	6			
Attending him and Register to draw up and enter Order -	0	6	8			
Paid for Order, Copy, and Service	0	9	0	0	1	0
Drawing Bill of Costs, and Copy, fol. 12 - -	0	8	0			
Warrant on leaving Copy, and Service - - -	0	4	6			
Warrant to tax, Copy, and Service	0	4	6			
Attending taxing, Clerk in Court (a) and Solicitor -	0	13	4	0	6	8
Paid for Report, &c. -	0	17	6	0	2	6
Paid filing, and for Office Copy	0	5	10			
Attending the Master for Report, and filing - -	0	6	8			
Subpoena for Costs and personal Service in Town (conditional)	0	13	0			
Term Fee, Clerk, and Solicitor	0	16	8			
Letters and Messengers -	0	5	0			

(a) The Clerk in Court must personally attend.

PRACTICAL REMARKS.

AN Injunction is a *remedial and judicial* Writ issued by Order under the Seal of the Court, in various Stages of a Suit, at the Instance of a Party entitled to Equitable Relief, to restrain the Commission or Continuance of some Act of the Defendant. And as a Work of Merit observes, it differs essentially from a Prohibition, the latter issuing from a Superior Court, against an Encroachment of Jurisdiction directed to the Judge, and to the Parties suing. An Injunction neither assumes any Superiority, nor denies the Jurisdiction, and is directed to, and controuls the Parties and not the Court (*a*), on the Ground that the Parties are making Use of the Jurisdiction contrary to Equity and Conscience.

To enumerate the almost endless variety of Cases, in which the Court of Chancery interposes by Injunction, would greatly exceed the Province of an Annotator, those of most ordinary recurrence, are, to restrain a Party from proceeding in *Courts of Law*, in the *Spiritual* and *Admiralty* Courts, in the Courts of Exchequer, and other Courts of Equity; in the Court of Session in Scotland, in the Colonial Courts in the West Indies, and in a Foreign Court. To restrain the Negociation, or Indorsement of Notes and of Bills of Exchange, the Transfer or Acceptance of Stock in the Bank, and other Public Companies, the Sale or Conveyance of Land contracted to be Sold, or the Payment of the Purchase Money; to prevent the wasting of Assetts or other Property *pendente lite*; to prevent waste or damage by pulling down Buildings, felling Timber, ploughing up ancient Meadows, or destroy-

(*a*) Atk. 516, 630. Eden. inj. 4.

ing other Parts of the Freehold and Inheritance, and from working Mines; to restrain the Infringement of Patent and Copy-rights, and the Publication of Private Letters. And wherever a legal Right would be relieved against in a Court of Equity, an Injunction will be granted to restrain Proceeding at Law, in respect of such legal Right. And as a Judicial Writ it issues, to yield up, quit, or continue the Possession of Land, in Execution of a Decree. Generally the Court has no Jurisdiction to stay by Injunction the Proceedings on a Writ of *Mandamus*, nor on an *Indictment*, or Criminal *Information*, or a Writ of *Prohibition* (*a*); but by a Decision of Lord Hardwicke, followed by Lord Eldon, if a Plaintiff in Equity prefers an Indictment in Matters mixed up with Proceedings in Equity, the Court may injoin (*b*).

The Orders of Lord *Bacon* and Lord *Clarendon*, direct that no Injunction for stay of Suit be granted or revived upon Petition (*c*); and in conformity to these Rules, it is laid down as a general Rule of Practice, that an Injunction to restrain Proceedings at Law, will not be granted unless a Bill be filed: but it should seem there are Cases, though not of general Practice, of Circumstances raising an Exception; where Suits have been depending for other Purposes, Orders have been made to restrain Proceedings at Law, and in the Ecclesiastical Court, upon the *Undertaking* of the other Party to file a Bill forthwith (*d*); in an extreme Case of Nuisance Lord Roslyn granted an Injunction upon Petition and Affidavit (*e*): and Tenants upon a Lunatic's Estate have been restrained by Injunction upon Petition from Cutting Timber, where no Bill has been filed (*f*). An Injunction will not be granted to restrain a Person *not*

(*a*) 6 Mod. 12. 2 Ves. 396.

(*d*) 2 Eq. Ca. Abr. 527. 2

(*b*) 2 Atk. 302. 18 Ves.

Ba. and Beat. 349.

220.

(*e*) 5 Ves. 129.

(*c*) Ord. Canc. Bea. 12. 35.

(*f*) Dick. 68. 1 Ba. and

214.

Bea. 108.

Party to the Suit ; but this Rule bends to Circumstances ; a Party irregularly executing the Process of the Court, has been protected by Injunction against an Action at Law (a) : and a Solicitor who had been in Partnership with the Defendant's Attorney in a particular Cause was restrained by Injunction from going over to the other Side, and becoming Attorney for the Plaintiff (b). In Suits for the Administration of Assets, Creditors *not Parties* have been restrained after a Decree (c) from proceeding at Law at the Instance of the Executor, upon the usual Affidavit of the State of the Funds (d) ; and the Court has interposed on the Application of the Plaintiff in the Cause, and of the Heir (e), or of another Creditor who has come in (f) : And the Injunction so obtained has been extended to stay Trial without the usual Affidavit (g). In some Cases the Court has interposed by Injunction to protect Executors, who have suffered Judgment at Law to go by Default, but not upon a Judgment *de bonis propriis*, or *de bonis testatoris*, *et si non de propriis*, and Costs *de bonis propriis* (h). If the Bill does not *specifically* pray an Injunction, the Plaintiff cannot move for an Injunction under the Prayer for general Relief (i). After a Decree for an Account, and for a Foreclosure, if the Mortgagor attempts to cut down Timber, Lord Eldon said he would enjoin him, although not so prayed by the Bill (k).

Injunctions to stay Proceedings at Law, are granted either before or after the Commencement of an Action, or to stay Trial ; and after Verdict to stay Judgment ; or after

(a) 1 Vern. 269. Dick. 169.
1 Ja. & Wa. 658. Kilshaw v.
Crowther, 2 July, 1824. MSS.

(b) Coop. 80. 19 Ves. 261.

(c) 1 Ves. 213. 4 Ves.
638.

(d) 4 Bro. P. C. 287. 8
Ves. 520. 2 Meri. 480. 2
Cox, 201.

VOL. I.

(e) 1 Ves. 211.

(f) 1 Bro. C. C. 183.

(g) 3 Bro. C. C. 23. Eden.
Inj. 32.

(h) 2 Meri. 482.

(i) 2 Atk. 3, 141. 13 Ves.

114. Ambl. 70. 1 Ves. and
Bea. 314.

(k) 1 Ves. & Bea. 314.

Judgment to stay Execution, and Proceedings under it (*a*): if Execution has taken place, to stay Money in the Hands of the Sheriff; or if Part only of a Debt has been levied, to restrain Process for the Residue (*b*). The Courts are unwilling to interfere where the Plaintiff appears to have lain by *till after* a Trial has taken place (*c*); but for the obtaining a Discovery, a Bill will be sustained for a Discovery and Injunction in the Meantime, though after a Verdict at Law (*d*).

The *common Injunction* to restrain Proceedings at Law, if prayed by the Bill, may be obtained upon Motion as of course without Notice, if an Appearance be not entered in due Time after the Return of a Subpœna (*e*), upon a Suggestion that the Defendant is in Contempt to an Attachment (*f*). And if a Peer of the United Kingdoms of Great Britain and Ireland, or a Lord of Parliament, or a Member of the House of Commons regularly served with Process, neglects or refuses to appear, the like Injunction will be granted upon an Order *nisi* obtained as *of course* for a Sequestration; but if the Defendant is abroad, an Affidavit of Merits is required. And a Defendant being *in default*, though not actually in Contempt, for not putting in a Plea, Answer, or Demurrer, within eight Days, exclusive of the Day of Appearance, Lord Eldon has held sufficient to ground an Order for the common Injunction (*g*): to prevent an Injunction issuing, or the Extension of an Injunction to stay Trial, or an Attachment, the Answer must be actually on the File in the Six Clerks' Office, at the latest by eight o'Clock in the Evening of the Seal Day, before the Motion for the Injunction is made (*h*): an Answer sworn and left at the Public Office, or at a Master's

(*a*) 10 Ves. 144. 3 Bro. C. C. 73.

(*b*) 1 Madd. Ch. 131.

(*c*) 2 Cox. 12.

(*d*) For. Ex. 94. 1 Swanst. 204. Eden. Inj. 44.

(*e*) Ant. p.

(*f*) 2 Meri. 476.

(*g*) 18 Ves. 522. 2 Meri. 476.

(*h*) 1 Sim. & Stu. 102.

House or Chambers, has been held a Nullity, until filed of Record (a). An Injunction to stay Proceedings at Law will be granted upon the Defendant's obtaining an Order for Time to answer, or to plead Answer or Demur, or for a Commission to take his Answer in the Country, or abroad, though the Defendant be not in Contempt; but where the Defendant appears in Time, or puts in an Answer before the Time for Answering has expired; an Injunction in the first Instance can only be obtained by Special Motion upon Notice, which by the Course of the Court is allowed under those Circumstances only, where the Party has not had *an Opportunity* of moving for the common Injunction: where a Judgment had been entered up on a Warrant of Attorney (b) for securing a Post-Obit Bond in the Vacation, and no Subpoena was returnable till the ensuing Term; Lord Eldon, upon Affidavit of the special Circumstances, granted an Injunction, the Plaintiff undertaking to serve the Defendant with immediate Notice, with Liberty to the Defendant to apply during the Sittings; but it is not granted on the *mere and sole Ground* of the Defendant in Equity being intitled to take out Execution before the common Injunction can be obtained (c). A Reference of the Bill for Impertinence, within the eight Days for answering, would prevent the Plaintiff from moving as of course for the common Injunction for want of Answer; he is in the same Situation as if the Time was not out, and can apply only upon Notice and Affidavit of Circumstances, until the Master has made his Report (d): and so a Plea or Demurrer or both, filed within the Eight Days (e); in some Cases, in an Injunction Cause, the Court will allow a Demurrer or Plea to be brought forward, and argued out of its Turn (f); but where the Cause has been unnecessarily

(a) 2 Meri. 474.

(e) 3 P. Wms. 396. 13

(b) 3 Meri. 226. n.

Ves. 165.

(c) 3 Meri. 225.

(f) 2 Atk. 113. 13 Ves.

(d) 1 Bro. C. C. 574. 1 167.

Cox. 104.

protracted, the Court will not interfere (a). If upon Argument either should be overruled, it would furnish a Ground for an immediate Application for the common Injunction; but as a Demurrer may be filed at any Time before Process of Contempt be *actually issued* (b), though the Time for answering may have expired, if an Injunction has been taken upon a *Dedimus*, the Defendant cannot Demur alone, though neither in Contempt nor under an Order for Time (c): if by the Pendency of a Demurrer or Plea, any Advantage has been gained by the Defendant: upon overruling the Demurrer, or disallowing the Plea, the Parties would be placed in the same Situation they were in, as if the Demurrer or Plea had not been filed; as in the Instance of a Defendant filing a Demurrer, and thereby preventing an Injunction, and taking the Plaintiff in Execution, the Demurrer afterwards overruled and an Injunction granted: Lord Eldon discharged the Plaintiff out of Custody, observing, that where it turns out in the Result that there is an equitable Case, the Principle is to deal with it as such from the first; that the Plaintiff being intitled to an Answer, if the Defendant thinks fit to file a Demurrer, which the Court holds untenable, and therefore sustains the Plaintiff's Equity; it is the Duty of the Court to place the Plaintiff where he would have been but for an untenable Defence (d); but if the Defendant to a Bill to restrain Proceedings at Law resides *abroad*, when the Plaintiff applies for the Injunction, he must by Affidavit support the material Facts in the Bill (e). The common Injunction does not as of course restrain a Party from proceeding either in the *Spiritual Court* (f) or the *Admiralty Court* (g): to stay Proceedings, a Special Application is required; and in the Petty Bag Proceedings, by *scire facias*, or Suits by

(a) 2 Madd. Rep. 181.

(e) 11 Ves. 567. 4 Ves. 359.

(b) 3 Bro. C.C. 372. 2 Cox,
268.

(f) 1 P. Wms. 300. Banb.
27. 3 Atk. 628.

(c) 3 Meri. 304.

(g) 1 P. Wms. 300. Dick.

(d) 3 Meri. 225.

223. Toth. 114. Amb. 19.

or against privileged Officers and Ministers of the Court; are stayed by Order made in Term, and not at the Sittings.

The common Injunction, to restrain Proceedings at Law for want of Appearance, is obtained by Motion as of course, without Notice, any Day in Term, or on the Seal Days before or after Term, by leaving an Affidavit of Service of the Subpoena with the Plaintiff's Clerk in Court, giving Directions to issue an Attachment; but unless the Plaintiff is, from the State of the Cause, in a Situation to move on the Seal Day, he cannot move at an adjourned Seal (a). A Motion-Paper, with the Names of the Plaintiff and Defendant, must be given to Counsel, with Instructions to move as of course for an Order for an Injunction to restrain Proceedings at Law, upon Suggestion of Defendant being in Contempt to an Attachment for not appearing; the Instructions, signed by Counsel, must be left with the Registrar to draw up the Order, which being passed and entered at the Register-Office, and delivered to the Plaintiff's Clerk in Court, he will make out and seal the Injunction, for which Purpose, in pressing Cases, the Seal may be opened, upon Payment of a Fee of two Guineas; but as the Injunction takes effect from the Date of the Order, and not from the Time of sealing the Injunction (b), in Cases of extreme Urgency it would be advisable to serve the Order upon the Defendant's Attorney in the Action, and also upon his Agent in Town, by delivering to, and leaving with each of them *personally*, or with their managing Clerks at their respective Offices of Business, a Copy of the Order, shewing the original Order passed and entered at the Time of Service (c); and in like Manner with all convenient Dispatch, the Injunction must be *personally* served upon the Party (d), and upon his Attorney and Agent, by delivering to, and leaving with each of them a correct Copy of the Injunction, shewing the Original Writ, under Seal at the Time of Service, but the Party serving it

(a) 5 Madd. 45.

(b) 3 Madd. 220.

(c) 19 Ves. 380.

(d) 1 Ja. & Wa. 376.

is not obliged to deliver the Writ to be compared with the Copy served, nor would it in many Cases be safe to do so (a): but *personal Service* may be dispensed with under Circumstances, and an Order obtained substituting a Service at the Defendant's last Place of abode, or upon his Clerk in Court, or Attorney (b): where a Party, or his Attorney or Solicitor is in Court, and hears the Order for the Injunction made, he is as much bound as if he had been served with the Writ (c); and Lord Eldon has not only followed this Course of Practice, but has extended it as well to the Case of a Party actually present in Court, hearing the Motion, as also to a Person walking out of Court before the Order is pronounced, and to a Party standing outside, and informed by an Eaves-dropper, who heard the Order made (d); but (continues his Lordship,) a Solicitor, so intimating without Foundation, would be liable to Damages, or Indictment, and to be struck off the Roll (e).

If the Defendant or his Attorney be served with an Injunction, or with the Order for the Injunction before the Writ has been sealed, or by any Means be affected with Notice of an Injunction having issued (f), previous to the Commencement of an Action at Law, or before a Declaration has been filed or delivered, (the Injunction taking effect from the Date of the Order (g),) the Injunction stays all further Proceedings at Law (h); the subsequent Arrest of the Plaintiff in Equity (i), or the Delivery of a Declaration, have been held to be Breaches of the Injunction (k), and so Proceedings on the Bail-bond, or against the

(a) 2 Ch. Ca. 203. Eden. 18 Ves. 522. 2 Ja. and Inj. 66. Wa. 264.

(b) 10 Ves. 202. 1. Ja. and (g) 3 Madd. 320.
Wa. 643. 14 Ves. 206. (h) 10 Ves. 452. 18 Ves.

(c) 3 Atk. 567. 488.

(d) 14 Ves. 136. 18 Ves. 322. (i) 16 Ves. 144.

(e) 2 Ves. and Bea. 352. (k) 3 P. Wms. 147. 1 Meri.

(f) 3 Atk. 567. 14 Ves. 136. 3. 2 Ves. and Bea. 350.

Sheriff (*a*); ruling the latter to bring in the Body, after Bail excepted to, previous to the Injunction (*b*), or to pay over the Money levied (*c*), have been so considered; but where a Declaration has been delivered in an Action previous to the Injunction, the Plaintiff at Law may call for a Plea, and for want of it sign interlocutory Judgment, and go on to ascertain his Damages; or if the Cause is at issue, go on to Trial; or if a Verdict has been obtained, proceed to Judgment, and affirm if Error has been brought, the Injunction restraining Execution *only* (*d*). Where an Injunction has been obtained upon a Bill filed after Execution executed, the Goods not being out of the Hands of the Sheriff, and he proceeds to sell without Process, he cannot pay the Money to the Defendant, but will be ordered to pay it into Court (*e*): Lord Thurlow held that where an Injunction had been obtained even after Execution executed, that it was a Breach of the Injunction to call upon the Sheriff to pay over the Money, and Lord Eldon has held that if the Sheriff voluntarily paid over the Money, the Party receiving it would be ordered to pay it into Court (*f*); but that in Special Cases the Court will stay the Money in his Hands (*g*); the Practice formerly of making the Sheriff Party by original or supplemental Bill, having been disused (*h*): where the Plaintiff in Equity had been taken in Execution, and discharged out of Custody by a Judge's Order, upon payment of the Money levied, into the hands of the Master; and the Plaintiff afterwards obtained the common Injunction; on Motion to dissolve the Injunction, the Plaintiff was allowed to apply to the Court of Law to have the Money paid over upon the Terms of

(*a*) Ambl. 32. 17 Ves. 385.

1 Ves. and Bea. 19.

(*b*) 16 Ves. 141.

(*c*) 2 Anst. 556. 3 Meri. 234.

(*d*) 16 Ves. 141. 2 Ves. and Bea. 41.

(*e*) 3 Meri. 234. Dick. 549.

2 Ves. and Bea. 41.

(*f*) Ibid.

(*g*) 2 Swanst. 549.

(*h*) 3 Meri. 235.

paying it into the Bank to abide the Event (a) ; and where Judgment has been entered against two Obligors, on a joint and several Bond, and an Injunction has been obtained by one ; Execution issued against both, with Instructions to take only one, has been held not a Breach of the Injunction (b) : so issuing a *scire facias* against an Executor upon a Judgment *de bonis testatoris quando*, &c. (c). The common Injunction to restrain Proceedings at Law does extend to distress for Rent (d).

Where the Injunction has not been obtained in Time to prevent the Defendant from proceeding to Trial, in an Action previously commenced ; the Court will *extend the Injunction to stay* Trial until a full Answer has come in, or until the Return of a Commission for the Examination of Witnesses *abroad* (e), upon *special Application* with Notice, supported by the Plaintiff's Affidavit, *that the Discovery he expects from the Defendant's Answer will be material to his Defence, and that the Defendant's Answer, together with other Evidence to be adduced, will constitute a good Defence at Law* (f). And the Court has considered the Affidavit as one of those which cannot be answered, and allowed it to be read, though filed only the Day before the Application (g) ; but the Court refused to extend an Injunction to stay Trial, upon Motion made immediately before, or during the Assizes, at which the Action was to be tried (h) ; where Laches in the Party was shewn it was refused with Costs (i). It may be proper to remark, that an Order for the common Injunction, and to extend it to stay Trial, cannot be applied for at the same Time, nor at

(a) 2 Swanst. 550.

(b) 1 Ves. and Bea. 16.

(c) 3 P. Wm. 146.

(d) 1 J. and Wa. 392.

(e) 7 Bro. P. C. 245. 2 204.

Swanst. 258.

(f) 16 Ves. 223. Eden.

Inj. 84.

(g) 8 Ves. 46.

(h) 13 Ves. 454. 1 Swanst.

(i) 3 Madd. 102.

the same Seal, when the common Injunction is moved (a), but under Circumstances, an Injunction to stay Trial has been granted in the first Instance; where a Demurrer had been filed, and over-ruled, and the Argument postponed by Defendant's Counsel, so as to deprive the Plaintiff of the Opportunity of obtaining the common Injunction, and the Extension of it in Time to stay Trial; and the Office Copy of the Answer could not be procured early enough to produce in Evidence: upon special Application to restrain the Defendant's proceeding to Trial, Lord Eldon made the Order (b): and after a Decree for the Administration of Assetts, Creditors have been restrained by Injunction from proceeding to Trial, without the usual Affidavit (c); but it may be proper to observe that an Answer filed previous to the Application, is an Objection to the Motion; but if excepted to, upon Defendant's Submission, the Order will be made: an insufficient Answer being considered as no Answer (d). And the Answer of one where there are several Defendants, will not be sufficient to discharge the Order to extend the Injunction (e): an Order to stay Trial is not usually discharged, and the Injunction dissolved so far only as it extends to stay Trial, distinct from an Order to dissolve the original Injunction, which if dissolved draws after it the Order to stay Trial (f), but a *special Injunction* after Answer, restraining Trial till further Order, has been dissolved so far only as it extends to stay Trial (g).

The Defendant upon filing his Answer, and payment or tender of the Costs of Contempt to the Plaintiff's Clerk in Court, may immediately apply by Motion as of course without Notice, any Day in Term, or at the Sittings before or after Term, to dissolve the common Injunction, and the Court will entertain the Application even after

(a) 3 Bro. C. C. 87. 10
Ves. 450.

(b) 3 Meri. 229. n.

(c) 3 Bro. C. C. 23.

(d) 1 Ves. and Bea. 366.

(e) 19 Ves. 83.

(f) 2 Ves. and Bea. 40.

(g) 1 Swanst. 228.

a Rule to produce Witnesses (*a*): but generally where there are more Defendants than one, the Court will not dissolve the Injunction till all have answered (*b*). Lord Eldon dissolved an Injunction against a Verdict in a joint Action, as against those Defendants who had answered, but not as against all the Defendants, pending Exceptions to the Answers of the others (*c*); where *Cestui que Trust* and Trustee were co-Defendants, the Refusal of the latter to answer was held to be no Objection to dissolving the Injunction as to the *Cestui que Trust* (*d*). An Author of great practical Knowledge lays it down generally, that a Plea allowed is a full Answer, and that Defendant may apply to dissolve absolutely in the first Instance (*e*): but a Work of considerable Authority states that where a Plea is allowed the Injunction is ordinarily at an end, but not always, and that an Injunction is not absolutely dissolved upon the Allowance, but only *nisi*, for that some Equity may be shewn to continue it (*f*). Where a Plea is ordered to stand for an Answer with Liberty to except, the Defendant upon putting in an Answer, must obtain an Order *nisi*, and proceed to make it absolute (*g*). An Order to dissolve an Injunction generally, draws after it an Order extending the Injunction to stay Trial (*h*), but a *special Injunction* obtained after Answer restraining Trial till further Order, has been dissolved, so far as it extends to stay Trial only (*i*). Where an Injunction has issued *irregularly*, it may be discharged on Motion, but any Act founded on it would be a Waiver of the Irregularity; and so a Defect in the Injunction, by putting in an Answer and moving to dissolve; but an Application for Time to answer, is not a

(*a*) Dick. 684. 2 Ves. & Bea. 42.

(*b*) Prac. Reg. Wy. 234. 242. Barnard, 352.

(*c*) 1 Ves. & Bea. 497.

(*d*) Mos. 355.

(*e*) Dick. 537.

(*f*) Prac. Reg. Wy. Ed.

(*g*) Mos. 198.

(*h*) 2 Ves. & Bea. 41.

(*i*) 1 Swanst. 228.

Waiver of the Irregularity (a). To dissolve the common Injunction, Instructions must be given to Counsel to move the Court, without Notice for the usual Order to dissolve the Injunction, which the Court will grant as of course, unless Cause to the Contrary be shewn, on the Day in the Order mentioned; the Brief signed by Counsel must be left with the Register, and the Order to shew Cause drawn up, passed, entered, and served upon the Plaintiff's Clerk in Court: if Cause is to be shewn upon the Merits, a Brief of the Bill and Answer with proper Instructions, and a Copy of the Order annexed, must be prepared and delivered to Counsel previous to the Day appointed by the Order, and an Office Copy of the Affidavit of Service of the Order should not be forgotten in shewing Cause on the Merits, or the Equity confessed in the Defendant's Answer; the Plaintiff usually selects such Parts of the Answer as he conceives supports the Injunction, the general Rule is, to *allow nothing to be read but what appears on the Face of the Answer*, unless in a Case of Waste: if, says Lord Eldon, the Answer denies all the Circumstances upon which the Equity is founded, the Rule is to give Credit to the Answer, and if five hundred Affidavits are filed, not only by the Plaintiff, but by as many Witnesses, *no one can be read* for the Purpose of dissolving, or not reviving the Injunction, unless in a few excepted Cases (b). Affidavits have been admitted in support of Allegations neither admitted or denied, but never *in Contradiction to Assertions positively made by the Answer* (c). An Answer admitting a *written Agreement*, but insisting that it was *contrary to the Intention* of the Parties, was not allowed to have any Weight in resisting an Injunction (d), but an Answer of one Defendant referring to the Answer of a co-Defendant, has been allowed to be read upon a Motion for an Injunction (e): if the Plaintiff should not

(a) 2 Ves. 22. Barnard,
27. Eden. Inj. 88.

(b) 8 Ves. 35.

(c) 1 Meri. 499. 3 Meri. 11.

(d) 4 Madd. 255.

(e) 1 P. Wms. 311.

be sufficiently prepared on the Day for shewing Cause, the Time is usually enlarged, until the next Day of Motions (*a*), upon the Plaintiff undertaking not to except, but to shew Cause on the Merits. And on a Motion to dissolve made at the last Seal after Trinity Term, Cause will be ordered to be shewn amongst the Petitions during the then Sitings (*b*); the Order made on the Motion for dissolving or continuing the Injunction must be drawn up, passed, and entered usually by the Party in whose Favour it operates, and served upon the adverse Clerk in Court, and where necessary upon the Attorney in the Action.

The Plaintiff may also shew a Reference of the Answer for *Impertinence* or *Scandal*, as Cause against dissolving the Injunction (*c*): with this Distinction, that a Reference for Scandal is not like a Reference for Impertinence, waived by a subsequent Reference for Insufficiency: it does not seem necessary that an Order of Reference should be obtained previous to the Time for shewing Cause; the Court will allow a Motion for the Reference at the Time of shewing Cause, and the Court will not presume Delay in drawing up the Order, but if any occurs, the Defendant must complain to the Court (*d*); the Plaintiff upon this Reference is usually put under Terms of obtaining the Report in four Days (*e*), or a Week (*f*): and if not obtained within that Time, the Injunction is dissolved of course (*g*); but the Time may be enlarged by Consent, or upon Application to the Court. If the Master reports the Answer *not impertinent*, the Injunction is gone, and Exceptions to his Report cannot be shewn as Cause against dissolving the Injunction (*h*): nor if reported impertinent is it necessary to have the impertinent Matter

(*a*) 5 Ves. 552. Prac. Reg.
Wy. 234.

(*b*) 5 Ves. 552.

(*c*) 2 Cox. 24. 12 Ves. 18.
14 Ves. 534.

(*d*) 14 Ves. 526.

(*e*) 4 Madd. 237.

(*f*) 14 Ves. 534.

(*g*) 4 Madd. 237.

(*h*) Coop. 93.

actually expunged before an Application is made to dissolve the Injunction, upon the coming in of the Answer, though Defendant cannot move it pending the Reference (a). If after the Impertinence is expunged, Exceptions are taken and disallowed, the Injunction may be dissolved on Motion in the first Instance without an Order *nisi* (b): the Course of Proceeding upon Impertinence, will be found in the former Part of this Work.

Exceptions to the Answer may be shewn as Cause against dissolving the Injunction, and it has been generally considered necessary that they should be actually filed (c), but if not actually on the File, upon Plaintiff's undertaking to file them immediately, they will be allowed (d): the Time within which Exceptions to an Answer may be filed, and the Course of Proceeding upon Exceptions, have been before treated of (e). The Order made on shewing Cause directs the Plaintiff to obtain the Master's Report in four Days, but the Court will in some Cases enlarge the Time, or it may be so by Consent (f). In strictness, if the Plaintiff fails in obtaining the Report within the four Days, the Injunction is of course dissolved (g), or if the Master reports in favour of the Answer, the Injunction is *ipse facto* gone, and an Exception to the Master's Report will not uphold it (h). But if upon Exceptions taken to the Report, the Court should afterwards be of Opinion that the Answer was *not sufficient*, the Plaintiff may move to revive the Injunction (i). Where the Master reports the Answer insufficient, the Course is to continue the Injunction as if no Answer had come in, until the Exceptions are answered, the Defendant may then move to dissolve the Injunction:

(a) 2 Cox. 26. 14 Ves. 534.

(b) 2 Ves. & Bea. 291.

(c) Prac. Reg. Wy. 241.

(d) 2 Meri. 479.

(e) Ant. pa.

(f) 2 Ves. & Bea. 40. 14 Ves. 534.

(g) Dick. 292.

(h) 2 Ves. & Bea. 41. 2 Meri. 479.

(i) 2 Cox, 428.

if upon Argument the Exceptions are allowed, or the Defendant submits to answer, the Defendant may of course obtain an Order to amend the Bill, and that the Defendant may answer the Exception and Exceptions together; *but if before* the Order is applied for, or drawn up and served, a further Answer is put in (*a*), the Order to amend will be refused or discharged (*b*), and the Injunction stands or falls upon the original Bill and Answer (*c*); but the Defendant may move, upon the Application to amend, that the Amendment may be made in Ten Days, or the Order to amend discharged (*d*); pending Exceptions to an Answer to an amended Bill, a Motion to dissolve the Injunction absolutely in the first Instance has been refused (*e*).

It may be material to remark, that an Injunction is never *continued* to the Hearing *as of course*; but where the Defendant's Answer has not displaced the Plaintiff's Equity, the Injunction already obtained will be continued. An Admission in an Answer, of Waste committed, or threatened, has been held sufficient to *continue* the Injunction to the Hearing (*f*), and so a Reference for Impertinence (*g*); but in restraining Proceedings at Law, if the Injunction is continued, Terms are sometimes imposed upon the Plaintiff, as giving Judgment in the Action, with Stay of Execution, and a Release of Errors; and after a *Verdict at Law*, or an *Award*, or a *Sum sworn* to be due by the Answer, upon bringing the Money into Court (*h*): and so, where the Defendant is abroad, and the Injunction is obtained for Want of Answer, the Court, upon Defendant's Application before Answer, will order the Money recovered by a Verdict to be paid into Court within a given Time, or that the Injunction be dissolved (*i*); but it should seem that an

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| (<i>a</i>) Dick. 255. 1 Ves. j. 88. | (<i>f</i>) 3 Atk. 485. Dick. 101. |
| (<i>b</i>) 2 Cox, 392. 11 Ves. | (<i>g</i>) 2 Anstr. 591. |
| 578. | (<i>h</i>) Prac. Reg. Wy. 237. |
| (<i>c</i>) Dick. 255. | 240. 1 Cox, 330. |
| (<i>d</i>) 1 Sim. & Sta. 105. | (<i>i</i>) 2 Bro. C. C. 14. 182. |
| (<i>e</i>) 2 Meri. 477. | 1 Cox, 330. |

Affidavit will be required to contradict the material Allegations of the Bill.

It is laid down in a Work of considerable Authority, that if an Injunction has been dissolved, it may be *revived on Special Motion*, upon sufficient Cause shewn (*a*). Where the common Injunction had been dissolved, upon the Answer coming in, and the Bill was amended, and Defendant in Contempt for not answering, the Injunction was, upon Special Motion, revived (*b*). So where a Reference for Insufficiency was shewn for Cause against dissolving the Injunction, and the Plaintiff put upon obtaining the Master's Report in four Days, and failing to do so, the Injunction was dissolved; upon the Answer being afterwards reported insufficient, the Injunction was revived (*c*): but an Injunction will not be revived pending the Re-hearing of an Order, and allowing an Exception to a Report of the Insufficiency of an Answer (*d*), nor upon the Report of an Answer being impertinent (*e*); nor will the Injunction be revived as of course upon amending the Bill where the Injunction has dropped, or been dissolved on the Merits, or upon a subsequent Amendment. In those Cases the Application to revive the Injunction must be special, upon Notice (*f*). The Death of the Plaintiff, in an Injunction Cause, abates the Suit, but the Injunction is not dissolved; the Course is to move, on the Part of the Defendant, that the Plaintiff's Heir or Representative may revive the Suit within a given Time, usually a Week, or that the Injunction may be dissolved; and if Defendant dies before a Decree, pending an Injunction, his Heir or Representative must obtain a similar Order upon the Plaintiff (*g*). It has been held

(*a*) Prac. Reg. Wy. 242.
Eden. Inj. 119.

(*b*) 2 Meri. 476. Dick.
755.

(*c*) 4 Madd. 237. Dick.
292.

(*d*) 1 Ves. & Bea. 503.

(*e*) 4 Madd. 237.

(*f*) 2 Ves. & Bea. 102.
13 Ves. 323. 2 Ves. 19.

(*g*) 1 Cox, 411. 2 Cox.
50.

not necessary upon an Abatement to file a Bill of Revivor, merely to keep on foot a perpetual Injunction (*a*).

It should not escape the Attention of a junior Practiser, that an Injunction *drops of course upon Amendment of the Bill* (*b*); to keep the Injunction on foot, the usual Course is to obtain an Order, upon Notice, *for Leave to amend without Prejudice to the Injunction already granted* (*c*); but an Amendment after Exceptions allowed, and not answered, does not affect an Injunction previously obtained: Lord Eldon held it of course, before a further Answer came in to move to amend, and that Defendant might answer the Exceptions and Amendments together, and that the Answer must come in before an Application could be made to dissolve the Injunction (*d*): and under Circumstances, though rarely, a re-Amendment has been allowed, upon Affidavit *clearly and positively* ascertaining its Nature, and that the Plaintiff had not a Knowledge of the Facts proposed to be introduced by Amendment, so as to have been able to bring them on Record sooner (*e*). In one Case the Court required the proposed Amendments to be stated, to see whether they were material, and if material, to be shewn, by clear and positive Affidavits, that they related to Facts of which the Plaintiff had not a sufficient Knowledge to put them upon the Record sooner (*f*); but an Injunction obtained on such Affidavits, and in Default of answering, may be controverted by Defendant *before Answer*, upon Affidavit falsifying the Statements in the Plaintiff's Affidavit (*g*). After an Answer not excepted to, Liberty to amend, without Prejudice to the common Injunction, has been refused with Costs (*h*): so, pending Exceptions to the Answer, it would be irregular, till they

(*a*) Dick. 471. 2 Ves. j. 316.

(*b*) 2 Ves. & Bea. 102.

(*c*) 3 Madd. 475.

(*d*) 3 Meri. 465. 1 Madd.

R. 449.

(*e*) 3 Ves. & Bea. 144.

(*f*) 3 Ves. & Bea. 148.

(*g*) 2 Meri. 479.

(*h*) 2 Ves. & Bea. 330.

are disposed of (a). The Order to amend does not prevent the Injunction being extended to stay Trial.

Injunctions founded upon Special Orders, are termed *Special Injunctions*: to restrain Waste, or other *immediate and irreparable* Injury, they are granted upon Motion and Certificate of the Bill being filed, supported by Affidavits verifying the Allegations in the Bill, and other material Facts and Circumstances. To restrain Proceedings at Law, they are issued *ex parte* in those Cases only where the Party has not had an Opportunity of obtaining the Common Injunction, as on Judgments on Warrant of Attorney and the like: and sometimes upon Special Notice, and Affidavit of the material Facts (b). In the Vacation when the Court is not sitting, they are granted upon Petition and Affidavit with a Certificate of the Bill being filed (c); formerly the Course was not to serve a Subpœna (d), but recently, Lord Eldon has held it necessary that a Subpœna should be served previous to the Application (e); the *Statute of Ann*, allows a Subpœna to Issue upon an Injunction Bill to stay Waste, or to restrain Proceedings at Law, before the Bill is filed; but generally after an Appearance a Special Notice of Motion for an Injunction, must be given (f); in Cases in the nature of Waste, an Order for an Injunction will be granted upon an *ex parte* Application after Appearance, but if the Fact of Appearance is not stated it will be discharged (g). An Appearance only the Day before the Motion, will not prevent the Injunction, but it seems to be different if the Appearance had been long enough to have enabled the Plaintiff to give Notice (h). The Affidavit upon which the Plaintiff applies for the Injunction must set out his Title *particularly* (i): it should also state some actual

(a) 2 Sch. & Lefr. 515.

(e) 16 Ves. 338.

(b) 3 Meri. 226. n.

(f) 2 Ves. 112.

(c) Prac. Reg. Wy. 252.

(g) 3 Meri. 1.

1 Bro. C. C. 166.

(h) 15 Ves. 605.

(d) 3 Bro. C. C. 476. 2

(i) 1 Bro. C. C. 57.

Anstr. 851.

Violation of his Right, some Fact, as the cutting down or marking Timber, or the sending a Surveyor, or some well-founded Threat (*a*), or a reasonable Ground of Apprehension, not merely an Intention to commit Waste; and the Order for the Injunction usually restrains the Party till Answer or further Order (*b*). An Author of distinguished Merit observes, that there are few Points of Practice more satisfactorily established than that of the Plaintiff's Right to read Affidavits upon a Motion to dissolve an Injunction in contradiction to Defendant's Answer (*c*); laying down as a Rule, to which there is no Exception, that in moving to dissolve an Injunction *to stay Proceedings at Law*, Affidavits are never permitted to be read in contradiction to the Answer. To dissolve or continue Injunctions to stay Waste, or Acts in Nature of Waste, the Court is equally strict in not allowing Affidavits in contradiction to the Answer in support of the Plaintiff's Title: but as to *Facts of Waste*, they are allowed (*d*), and in Cases of Partnership, as to Exclusion or Mismanagement (*e*); and Affidavits of Facts have been received where Defendant having obtained Time to file Affidavits, puts in an Answer instead; the Answer has been considered as an Affidavit, and the original Affidavit in contradiction has been allowed (*f*). An Injunction obtained on Affidavits filed before the Answer, may be sustained by subsequent Affidavits: but an Injunction cannot be originally obtained upon Affidavits filed after the Answer (*g*), though it may upon Acts done subsequently: and Affidavits may be read on the Part of the Defendant in opposition to the Plaintiff's Affidavits in contradiction to the Answer (*h*). Upon the Motion to dissolve

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| (<i>a</i>) 5 Ves. 688. | 7 Ves. | (<i>e</i>) 19 Ves. 148. n. | 16 |
| 309. 417. | 11 Ves. 54. | Ves. 49. | |
| (<i>b</i>) Eden. Inj. 326. | | (<i>f</i>) 19 Ves. 350. | |
| (<i>c</i>) Ibid. | | (<i>g</i>) 1 Swanst. 252. | 3 Meri. |
| (<i>d</i>) 2 Bro. C. C. 88. | 1 Cox. | | 10. |
| 263. | | (<i>h</i>) 19 Ves. 154. | |

the Injunction, it will be dissolved absolutely, or continued to the Hearing; (and where necessary, subject to an Account) in some Cases an Issue on an Action is directed, or a Case for the Opinion of the Judges; but although the Judge's Certificate is against the Plaintiff's Title, the Cause must proceed to a Hearing: an Application to Dismiss the Bill has been refused (*a*); an Admission in the Answer, of Waste committed, or threatened, will sustain the Injunction till the Hearing (*b*).

In whatever Terms, says an Author of Merit (*c*), an Injunction may be directed, it is never dissolved, but by Motion in open Court; but occasionally, in extremely pressing Cases, the Lord Chancellor has in the Vacation appointed a special Hearing at his House.

To obtain a Special Injunction after Appearance, Notice of Motion must be served two Days previously upon the Defendant's Clerk in Court, and the Affidavits (if any) in Support of the Application, and of the Service of Notice, must be filed in due Time at the Affidavit Office, and Copies of the Former taken to read in Court; a Brief of the Bill and Affidavits, and of the Answer, if it has come in, must be prepared, and with a Copy of the Notice, and proper Instructions given to Counsel to move for the Injunction; when the Motion comes on the Solicitor must attend the Court with a Copy of the Bill, and Office Copies of the Affidavits and the Motion; and if the other Side do not appear, Service of the Notice must be proved by the Office Copy of the Affidavit of Service. If the Court makes an Order for the Injunction, the Brief must be taken to the Register Office, and the Order drawn up, passed, and entered there, must be left with the Plaintiff's Clerk in Court, with Instructions to make out and seal the Injunction.

In the Vacation when the Court is not Sitting, immediately upon the filing the Bill, the Injunction may be obtained on Petition supported by Affidavit of the Allegations in the Bill, and the Six Clerk's Certificate of the Bill

(*a*) 3 Atk. 485. (*b*) 1 Swanst. 550. (*c*) Eden. Inj. 323.

being filed; the Six Clerk's Certificate must be procured from the Petitioner's Clerk in Court, and a Petition stating very fully the material Allegations in the Bill, and praying the requisite Injunction, must be ingrossed and left with the Lord Chancellor's Secretary, at his Office in Lincoln's Inn Fields, annexing thereto the Six Clerk's Certificate, accompanied by confirmatory Affidavits in support of the Petition sworn at the Public Office in Town, or before a Master Extra in the Country, expressing in strong and pointed Terms, and verifying the Charges and Statements in the Bill; and as the Applicant is intitled to have the Petition answered the very Day it is presented to the Secretary (a); the Petition with his Lordship's Order thereon, must be immediately carried to the Register Office, and the Order drawn up, passed, and entered there, and left with the Party's Clerk in Court to make out and seal the Injunction, and if from the Urgency of the Matter in dispute, it may be expedient to open the Seal, it may be done, upon payment of an extra Fee of two Guineas.

An Injunction must be *personally served* upon the Party, his Attorney, or Solicitor, and in cases of Waste or irreparable Mischief or Injury upon his Servants, Workmen, and Agents, and all Persons concerned, by delivering to, and leaving with each of them a correct Copy of the Writ, shewing the original Injunction under Seal at the Time of each respective Service; but under Circumstances, the Court will by Order upon Motion and Affidavit, dispense with personal Service, by directing a Copy to be left at the Party's Dwelling, or last Place of Abode (b). If a Party is present when the Order is made, or withdraws previously before pronounced, he will be in Contempt for non-obedience: in an extreme Case, it might be adviseable, to serve a Party in the Cause with a Copy of the Petition, with his Lordship's Order thereon, or more regularly, with the Order for the Injunction, followed up by Service of the Injunction when

(a) 3 Meri. 15.

(b) 14 Ves. 206. 1 Ja. and Wa. 643.

sealed ; by a recent Decision, if a Party has been informed of an Order for an Injunction against him, however loose the Information, even from an Eaves-Dropper, it would be sufficient to put him to a Denial of the Fact of Information (a) ; on the other Hand, where an Insolvent Court Attorney corruptly and falsely intimated that an Order had been made, Lord Eldon held that he was liable to be struck off the Roll, to Damages, and to an Indictment for a Misdemeanor (b).

It remains to subjoin, that an Injunction is an Order of the Court, and however erroneously or improperly issued, must be obeyed (c) ; if after regular Service of the Injunction, the Defendant or his Attorney, or Solicitor, or his Agents, Servants, or Workmen, in violation of the Injunction, do any Act they were enjoined from, it is a Breach of the Injunction, and a Contempt, which the Court will punish by Commitment to the Fleet Prison ; for the latter Purpose, an Application must be made by Motion, Notice of which must be *personally* served, upon the Defendant and all other Persons active in the breach of the Injunction ; *personal Service* of the Notice is *indispensable*, but if the Party, or any other Person in Contempt absents himself to avoid Service, the Court upon Motion and Affidavit of the Circumstance will dispense with personal Service, and by Order substitute a Service by Copy left at the Dwelling House, or last Place of Abode, shewing the original (d) ; to support the Application, the Acts of the several Parties in breach of the Injunction must be expressly and distinctly verified by Affidavits, which must be filed at the Affidavit Office, and Copies taken to read in Court ; a Brief of the Bill, Order and Affidavits must be given to Counsel, with proper Instructions to move for the Commitment of the Parties in Contempt, and the Solicitor must be prepared with Office Copies from the Affidavit Office of the Affidavits in support of the Motion, and of

(a) 2 Ves. and Bea. 349.

(b) Ibid.

(c) 6 Ves. 109. 3 Meri. 149.

(d) 6 Ves. 488. 1 Ja. and

Wa. 643. 19 Ves. 380.

those filed on the other Side in Answer, and also, of the Affidavit of Service of the Notice; and it may be useful to observe, that if the Injunction is required, the Motion cannot be heard without producing the original Writ (*a*); and upon hearing all Parties, if the Court should make an Order for Commitment, the Brief must be left with the Register, and the Order drawn up, passed, and entered, with Instructions for the Caption, given to the Lord Chancellor's Tipstaff, and he will procure the Lord Chancellor's Warrant thereon, which he will carry into Effect by taking the Parties into custody; but where the Breach is not a wilful, or contemptuous Violation of the Orders of Court, though no Act of the Parties would be a Waiver of the Contempt incurred, the Court is usually satisfied by a proper Submission, and Payment of Costs (*b*), but laches in a Party to enforce the Order for Commitment, might be held a Waiver of the Contempt. Peers, and Persons intitled to privilege of Peerage or of Parliament, and Members of the House of Commons, are not liable to Commitment; an Order for a Sequestration (*c*) must be applied for, and the Order drawn up, passed and entered, must be left with the Plaintiff's Clerk in Court, with proper Instructions to issue a Sequestration, and the usual Proceedings taken to carry it into effect (*d*).

An Injunction in execution of a Decree is a *judicial Writ in rem*, to *yield up*, to *quiet*, or to *continue* the Possession of Lands and Premises decreed, similar in effect to a Writ of Possession at Law (*e*); the Course of Proceeding to obtain and execute this Process, as laid down in a Work of great practical Information, and since followed (*f*), is, after a personal or substituted Service of a Writ of Execu-

(*a*) 1 Ja. and Wa. 376.

(*e*) Prac. Reg. Wy. 254.

(*b*) 3 Meri. 149. 17 Ves.
385. 16 Ves. 141.

(*f*) Dick. 617. 1 Bro. C.C.
375. 1 Cox. 101. 15 Ves.
180.

(*c*) Dick. 703.

(*d*) Ant. pa. 122.

tion of a Decree to deliver up Possession of the Premises in Question, Demand made, and Refusal to obey the Writ ; upon Affidavit, of the Facts and Circumstances made and left with the Clerk in Court, to Issue an Attachment for the Disobedience, which is not usually executed, but merely to bring the Party into Contempt, and to furnish a Ground for a subsequent Application by Motion without Notice, upon Affidavit made and filed of the Service of the Writ, the Demand and Refusal, and the Contempt to an Attachment, for an Order that an Injunction may Issue against the Defendant, and all Persons in Possession of the Premises pursuant to the Decree ; the Order drawn up, passed, and entered at the Register Office, must be left with the Plaintiff's Clerk in Court, to make out an Injunction, which must be personally served upon the Defendant, or any other Person or Persons in actual Possession of the Premises (a), and demand made for delivering up of the Possession, and upon Refusal and Service verified by Affidavit, an Application of course without Notice must be made for an Order for a *Writ of Assistance* to put the Party into Possession, the Order being drawn up, passed, entered and left with the Clerk in Court, the Writ of Assistance made out by him and sealed, must be delivered to the Sheriff with Instructions to carry it into effect.

(a) Dick. 619.

NE EXEAT REGNO.

THE Writ of *Ne Exeat Regno* is a remedial Process issued by Order without Notice (*a*), at the Discretion and under the Seal of the Court, in various Stages of a Suit (*b*), though not prayed by the Bill, and before Subpoena served (*c*), to restrain a Party from avoiding payment of a Demand, by withdrawing himself (*d*) out of the Jurisdiction of the Court. The general Rule is that in an Equitable Case, a Party cannot be held to Equitable Bail, where in a Legal Case, he cannot be compelled to give effectual Legal Bail: there is no Case, says *Lord Eldon*, in which you can hold a Party to Bail in Equity, where you might hold him to Bail at Law, except on the Balance of an Account (*e*). And in Cases of *Ne Exeat Regno*, a Court of Equity proceeds by analogy to the Proceedings at Law; in Cases of Legal Bail, the Doctrine laid down by a Gentleman to whose Labours the Profession is greatly indebted, shews, that by recent Decisions, this Rule has been broken in upon; the Court has allowed this Process to issue *after a Decree* for Alimony and Costs in the Spiritual Court (*f*): and the Court of Chancery holding a concurrent Jurisdiction with Courts of Law, has granted a Writ of *Ne Exeat Regno* upon Balance of an Account, although the Plaintiff swearing to the Balance might have Bail at Law (*g*); but, says the learned Author (*h*), with the Exceptions of *Alimony decreed*, and *Account*, the general Rule is as stated.

(*a*) 18 Ves. 353.

(*b*) 3 P. Wms. 314.

(*c*) 18 Ves. 353. 5 Ves. 96.

(*d*) 10 Ves. 164.

(*e*) 1 Turn. Rep. 103.

(*f*) 7 Ves. 172. 14 Ves.

261.

(*g*) 16 Ves. 471. 1 Ves.

and Bea. 133.

(*h*) Beam. Ne. Ex. Reg. 34.

The Application to obtain this Writ, generally speaking, must be supported by Affidavit of a clear equitable Debt, swearing *positively* (a) to a *certain* (b) equitable *Money Demand* (c), stating the Facts on which the Debt arises, and on which the Debt is grounded, without entering into any Explanation whatever (d); however great, observes the noble Judge, the Difficulty may be in complying with the Rule, the Affidavit must be as *direct and positive* as to the equitable Debt, as an Affidavit of a Legal Debt to hold to Bail (e). To this Rule a learned Author lays down an Exception that in a Bill for an *Account*, it is sufficient, if the Plaintiff swears to the Balance as to his belief (f); but although this Rule has been admitted to be as old as Lord Hardwicke's Time, recently the Court has intimated, that Facts or Declarations as the Ground of that Belief are expected to be stated (g): the Court held itself not at liberty to refuse this Process, where the Affidavit stated that a *positive Sum* was due upon *Balance of Account*, and that the Circumstance of the Defendant being a Foreigner, was no Ground for discharging it, although by the Law of his own Country he was not subject to Arrest upon unliquidated Balances of Account (h). And where the Demand arises in *autre droit*, as in a Suit against an Executor, the Plaintiff should swear either positively or to the best of his Knowledge or Belief, that *Assets* had come to the Defendant's Hands (i); and the Facts of the Defendant's Intention to go abroad, or his Threats, or Declarations to that Effect, or other Circumstances, shewing that Intention, must be *positively*

(a) 3 Atk. 501. 3 Bro. C. C. 370. 5 Ves. 91.

(b) 1 Atk. 521. 1 Bro. C. C. 376.

(c) 6 Ves. 284. 4 Ves. 591. 3 Bro. C. C. 218.

(d) 2 Atk. 489. 8 Ves. 597. 1 Ja. and Wa. 408.

(e) 10 Ves. 165. 3 Bro. C. C. 370.

(f) 3 Atk. 501. 8 Ves. 593. Beam. Ne. Ex. 23.

(g) 8 Ves. 597.

(h) 1 Ja. and Wa. 405.

(i) 2 Ves. 489. 16 Ves. 471.

sworn to (a) : it would not be sufficient to shew that another Person had said so (b) ; but it is not absolutely necessary that the Plaintiff should make the Affidavit, or the Party giving the Information upon which the Plaintiff founds his belief, if it comes from some of the Family (c) : a general Affidavit of Belief of the Defendant's Intention to quit the Kingdom is sufficient, without the Circumstances upon which that Information is founded (d) ; the Affidavit will be sufficient, if it states that the Debt will be endangered by the Defendant's quitting the Kingdom (e). It has not been held necessary to shew that the Defendant's Motive for quitting the Kingdom is to avoid the Process of the Court (f) ; usually the Application is supported by *Affidavit* of the Sum due, but Lord Eldon has decided that the Admissions in a Defendant's Answer would do as well as an Affidavit (g). And a Master's Report absolutely confirmed, has been held sufficient without an Affidavit of the Debt (h) : where the Person with whom the Debt was contracted has become a Lunatic, the Oath of his Committee will be sufficient (i). A Writ of *Ne Exeat Regno* cannot be obtained against an Attorney, upon a legal Demand, on the Ground that he is Privileged, and cannot be Arrested (k) ; but the Court has granted this Writ against an Attorney upon a Sum reported to have been overpaid him (l). It has been granted against the Obligor, in a Bond to the Trustees of his Marriage Settlement, at the Suit of an Infant, the Object of the Trust, after the Death of the Wife, being an equitable Debt. (m) The Court refused a *Ne Exeat*

(a) 7 Ves. 410. 417. 8 Ves. 567. 11 Ves. 54. 16 Ves. 470. (f) 8 Ves. 32. 19 Ves. 313.

Ves. 470.

(g) 5 Ves. 95.

(b) 7 Ves. 410.

(h) 18 Ves. 353.

(c) 18 Ves. 355.

(i) 19 Ves. 317.

(d) 5 Ves. 96.

(k) 15 Ves. 444.

(e) 8 Ves. 33. Beam. No. Ex. 28.

(l) Prec. Ch. 171.

(m) 1 Ja. & Wa. 605.

Regno to prevent an Irish Member of Parliament representing an Irish Borough, from going to Ireland (*a*). And a Writ of *Ne Exeat Regno* against a Feme Covert Administratrix cannot be sustained (*b*): nor where, after Costs had been Taxed, and Defendant was about to leave the Country, and fix his Residence abroad, before Payment of the Costs could be enforced, to assist the Process of the Contempt (*c*): a Residuary Legatee has been refused a Writ of *Ne Exeat Regno* against a Debtor of the Testator, on the Ground of Collusion with the Executor (*d*).

The Writ of *Ne Exeat Regno* may be obtained by Motion in Court, or at the Rolls *without Notice* (*e*) to the Defendant, or by Petition to the Lord Chancellor, or to the Master of the Rolls; the Application in all Cases must be supported by a full and positive Affidavit (*f*), as well of the Debt, as of the Circumstances on which it arises, and of the Fact of the Defendant's Intention to go abroad, or of his Threats or Declarations to that Effect, or of any overt Act from which such Intention can be reasonably inferred (*g*), and that the Debt will thereby be endangered is sufficient, without stating that the Object is to avoid the Demand or the Jurisdiction of the Court (*h*); but it does not seem necessary that the Affidavit should be made by the Plaintiff, nor that the Affidavit should be made by the Party giving the Information, upon which the Deponent founds his Belief, if it comes from Persons of the Defendant's Family (*i*). Matters of Account have been held an Exception to the general Rule (*k*), in such Case, swearing to Belief of the Balance due, has been held sufficient (*l*). And against an Executor, the Affidavit must

(*a*) 11 Ves. 43.

(*b*) 1 Turn. Rep. 96.

(*c*) 5 Madd. 471.

(*d*) 1 Ja. & Wa. 646.

(*e*) 18 Ves. 365.

(*f*) 5 Ves. 91. 10 Ves. 164.

(*g*) 8 Ves. 597. Dick. 380.

(*h*) 8 Ves. 33. 7 Ves. 417.

Beam. 28. 19 Ves. 313.

(*i*) 18 Ves. 355.

(*k*) 3 Atk. 501. 8 Ves. 593.

(*l*) 10 Ves. 165. 1 Ja. &

Wa. 405.

be either positive, or that to the best of the Party's Knowledge, or Belief, Assets have come to the Hands of the Executor (a); Admissions in the Defendant's Answer may be read from the Office Copy in support of the Application, and would be sufficient without an Affidavit (b). And the Master's Report absolutely confirmed, certifying a Debt or Sum due from the Defendant, Lord Eldon has held *of itself sufficient* to issue the Process (c). The Affidavit properly engrossed and sworn, must be filed at the Affidavit Office in Symond's Inn, and an Office Copy taken for use, a Brief of the Bill and Answer, (if it has come in) and of the Affidavit in support of the Motion must be prepared and Delivered to Counsel, with Instructions to move the Court for an Order that a Writ of *Ne Exeat Regno* may be issued against the Defendant for the usual Purposes, and that it may be marked (d) with a specific Sum, according to the Exigency of the Case: the Solicitor should attend the Motion, with the Office-Copy of the Affidavit, and if the Application be at an early Stage of the Suit, he should be prepared with the Six Clerk's Certificate of the Bill being filed, which may be obtained from the Clerk in Court; and if upon the Motion the Court should make the Order for the Writ, the Counsel's Brief must be left with the Register, and the Order drawn up, passed, and entered at the Register Office, and delivered to the Plaintiff's Clerk in Court, with Instructions to make out the Writ of *Ne Exeat Regno*, directed to the Sheriff of the County in which the Defendant resides, and to mark on the Back the Sum directed by the Order, for which Security is to be given by the Defendant.

If the Course to obtain the Writ be by Petition to the Lord Chancellor, or to the Master of the Rolls, a Petition must be prepared, comprising the material Allegations in the Bill, stating in positive Terms the Debt due, and the

(a) 3 Atk. 401. 3 Bro.
C. C. 370. 16 Ves. 470.

(b) 5 Ves. 91.
(c) 18 Ves. 353.
(d) 7 Ves. 172. 4.

Defendant's Intention to go abroad, and any Declaration made by him to that effect, and that the Debt is thereby endangered, and any other incidental Facts and Circumstances upon which the Application is founded ; (if the Answer has come in) any Admissions in the Answer, in Confirmation of the Application may be stated, or the Master's Report, ascertaining the Debt due ; and the Petition must pray that a Writ of *Ne Exeat Regno* may be directed to issue against the Defendant, and that it be marked with a specific Sum, commensurate with the Demand. *See Petitions.* Where the Writ issues against an Executor, at the Instance of a Legatee, it must be marked for the whole Amount of what is due, not only to the Plaintiff but to other Persons ; if it issue for a larger Sum than is due, the Court will order that so much only be raised as is really due, without quashing the Writ (*a*) ; in general it would be prudent to submit the Draft of the Petition and of the Affidavit supporting it, to the Perusal of Counsel, and when settled, the Petition must be ingrossed as usual, and the Affidavit in support of the Petition, comprising the material Facts and Allegations in the Petition, must be sworn and filed at the Affidavit Office, and an Office Copy taken, which, with the Six Clerk's Certificate of the Bill being filed, annexed to the Petition, must be left with Mr. Farrer, the Lord Chancellor's Secretary, at his Office in Lincoln's Inn-fields, and when answered, the Petition, with his Lordship's *Fiat* thereon, must be taken to the Register Office, and the Order drawn up, passed, and entered there, is to be left with the Plaintiff's Clerk in Court, giving him the like Instructions as beforementioned to make out and Seal the Writ. If the Application be to the Master of the Rolls, the Petition, with the Certificate and Affidavit, must be left with his Honour's Secretary, at his Office in the Rolls-yard, and when answered, the Petition must be taken to the Register Office, and the Order

(*a*) 1 Turn. Rep. 100.

for the Writ drawn up as beforementioned, and delivered to the Plaintiff's Clerk in Court. To carry this Process into effect the Writ must be delivered to the proper Sheriff, with Instructions for executing it. By the Terms of the Writ the Sheriff is to cause the Party personally to come before him, and give sufficient Bail or Security in the Sum indorsed on the Writ, that he will not go, or attempt to go into Parts beyond the Seas without Leave of the Court, and on his Refusal to commit him to the next Prison. When a Caption is made, the Defendant, to obtain his Discharge out of Custody, must execute a Bond, with two Sureties who are Housekeepers, to the Sheriff in double the Sum marked on the Writ, conditioned not to go or to attempt to go into Parts beyond Seas without the Leave of the Court; and he must also, with two Sureties of the like Description, enter into a Recognizance to the Master of the Rolls, and the Senior Master in Chancery, in the same Sum and upon the like Condition, usually the Condition of the Bond and Recognizances is not to go out of the Realm, or to Scotland (a); the Former of these is prepared and executed at the Sheriff's Office, and the Recognizance is prepared upon Instructions from the Defendant's Solicitor, by the Clerk to the Senior Master, before whom the Recognizance is to be acknowledged, and by whom it is inrolled. The Sheriff usually informs the Plaintiff's Solicitor of the Defendant being taken into Custody, and he sends Notice in writing of the Names and Places of Abode of the proposed Sureties. Generally, the Defendant's Solicitor gives the Notice; but in dealing with a severe Practiser, it would be prudent for the Plaintiff's Solicitor to keep a strict watch over the Proceedings, and on Receipt of the Notice, to make enquiry into the Solvency and Condition of the proposed Sureties, as in taking Bail at Law, and to give immediate Notice of any intended Opposition or Objection, and upon their

(a) 1 P. Wms. 262.

leaving Proposals for Sureties to attend the Warrant, and to oppose them by Affidavit, stating such Objections as he may be advised to take, and which, if the Master should think sufficient to reject them, would oblige the Defendant to propose others. The Defendant is entitled to his Discharge upon the Execution and Acknowledgment of the Bond and Recognizances by Himself and Sureties, and, if necessary, he may obtain an Order for that Purpose.

The Defendant, if he thinks himself aggrieved by issuing this Process *irregularly*, may, before Appearance(a), by Motion supported by Affidavit of the special Facts, giving two Days' Notice in Writing to the Plaintiff's Clerk in Court, discharge or quash the Writ, and the Court will always hear a Defendant moving to discharge this Process; but upon the Affidavit it will only require whether there is reasonable Ground to suppose that the Plaintiff will succeed in the Suit(b); and if the Writ has issued *oppressively*, it may be discharged with Costs (c), and the Answer may be read in opposition to the Affidavit on which the Writ issued (d); but to make the Proceeding vexatious, it must clearly appear that the Cause of Action is the same with that on which the former Process has been grounded. Where a Party had been held to Bail on a Writ of *Ne Exeat Regno*, on the lesser of two Sums claimed in Equity, and was afterwards Arrested for the larger Demand, as for Money had and received, it was held that the Principle did not apply (e). A Writ of *Ne Exeat Regno* has been Discharged, on the Ground that the Defendant had been previously arrested at the Suit of the Plaintiff for the same Debt and discharged (f), or that the Debt arises on a Future or contingent Demand, as on an Undertaking for an Indemnity (g). The Court has, upon Motion before Answer, or-

(a) 1 Turn. Rep. 98.

(b) 1 Ja. and Wa. 405.

(c) 1 Ves. and Bea. 371.

(d) 4 Ves. 577.

(e) 4 Taunt. 24.

(f) 2 Meri. 472. 8 Ves.

594. 3 P. Wms. 314.

(g) 1 Atk. 571. 14 Ves.

261. 1 Ves. j. 94.

dered the Defendant to give Security to abide the Decree (a); but a Writ of *Ne Exeat Regno* will not be discharged upon Affidavit denying the Intention of going abroad (b); nor with regard to the Debt, will the Defendant's Oath, or Plaintiff's Admission of no Debt due, prevail against a positive Affidavit of the existing Debt. The Writ has been discharged after Answer, on giving Security to abide the Event of the Cause, or to perform the Decree and Orders of the Court (c); and upon paying into Court the Sum for which the Writ is marked, the Recognizance of Defendant's Sureties has been discharged as to all, although in the meantime a larger Sum appeared to be due (d), and after a Decree for the same Matter as the Writ issued, the Sureties have been discharged, and their Bond cancelled (e); and Sureties, on Forfeiture of their Recognizances, have been ordered to pay the Money into Court (f).

(a) 2 Atk. 65.

(d) 1 Ves. 96. 1 Ves. and

(b) 8 Ves. 594. 16 Ves. Bea. 373. 2 Cox, 226.

470.

(e) Dick. 95.

(c) 1 Ves. and Bea. 129.

(f) 1 Meri. 49. 51.

3 Bro. C. C. 218. 1 Ja. and

Wa. 416. Dick. 115.

ADDENDA.

The following Cases have occurred too late for Insertion in the Body of the Work.

Vol. i. p. 347. *Certificate.*

The Master's Certificate of Disobedience to a Decree directing Deeds, Papers, and Writings to be produced before him, need not be filed within the four Days after it is signed, it is sufficient if it be filed before the four-Day order is delivered out.(a)

Vol. i. p. 324. *Examination of Parties. Sequestration.*

The Court will order a Sequestration to issue against a Defendant in custody, who is in Contempt for not putting in an Examination to Interrogatories, before the Master.(b)

Vol i. p. 512. *Baron and Feme.*

Where a married Woman, having a separate Interest, joins as a Co-Plaintiff or Co-Defendant with her Husband, instead of suing by her next Friend, or answering separately, it is to be considered as the Suit or Defence of the Husband alone, and will not prejudice a future Claim by the Wife.(c)

(a) 1 Sim. and Stu. 263.

(c) 1 Sim. and Stu. 185.

(b) 1 Sim. and Stu. 274.

Vol. i. p. 399. *Set off Costs.*

The Court will not direct the Costs of a Suit, and of an Action at Law, between the same Parties to be set off against each other. (a)

Vol. i. p. 247. *Parties. Supplemental Bill.*

Where the Claim of the next of Kin is raised on the Record, and one Person is, in that Character, a Party, other Persons found by the Master to be next of Kin may be heard by the Court, though not Parties. But where the Claim is not raised on the Record, and none of the next of Kin are in that Character Parties to the Cause, there must be a supplemental Bill to bring them before the Court. (b)

Vol. i. p. 534. *Answer.*

Defendant, after three insufficient Answers, in custody for want of a fourth, held entitled to be discharged immediately on filing it; but being reported insufficient, of course, to stand committed, and be examined upon Interrogatories settled by the Master, and referring directly to the points defective in the Answer, and to be examined personally by the Master, upon hearing Counsel on both sides, and the sufficiency to be considered not on the Answer alone, but as connected and taken with the preceding Answers; the written Answer to the Interrogatories was carried to the Master, who compared it with the Interrogatories, and determined upon its sufficiency, and supplied the Defect, by personal Examination, until it was sufficient; the Plaintiff had a right to see the Examination before Defendant's Release, but not to notice or hear any thing after the Examination. (c)

(a) 1 Sim. and Stu. 266.

(c) 1 Turn. Rep. 184.

(b) 1 Sim. and Stu. 319.

Vol. i. p. 527. *Order, Contempt.*

The Principle of Waiver applies to an irregular, but not to an erroneous Order.(a)

Vol. i. p. 332. *Examination of Parties.*

If after an Examination put into the usual Interrogatories before the Master, the Plaintiff discovers that the Defendant has received Sums not mentioned in his Examination, the Master is at Liberty to receive a new State of Facts, and further Interrogatories founded upon them, without the Order of Court.(b)

Vol. i. p. 916. *Committee. Lunacy.*

Where after a Decree in a suit, in which a Lunatic and his Committee were Defendants, the Committee died, and a new one appointed, ordered upon Motion that the new Committee should be named in all future Proceedings in the Cause.(c)

Vol. i. p. 176. *Revivor. Creditors.*

Where one of the Plaintiffs in a Creditor's Suit dies after a Decree, his personal Representative has a Right to revive, but quæ if before a Decree: a Creditor cannot sue on behalf of himself and others who have no common Interest with him: A Mortgagor has been held to have no common Interest with the Creditors at large, and cannot sue on their behalf.(d)

(a) 1 Sim. and Stu. 334.

(b) 1 Sim. and Stu. 335.

(c) 1 Sim. and Stu. 356.

(d) 1 Sim. and Stu. 358.

Vol. i. p. 654. *Issue at Law.*

Where a Decree directs Issues to try the validity of Orders, and the Plaintiff is desirous of having the Issues tried in a different County from that in which the Lands lie, the Order for that purpose cannot be inserted in the Decree, but must be obtained by Petition.(a)

Vol. i. p. 414, 972. *Injunctions.*

An *Injunction* may be obtained upon Motion, to restrain a purchaser under a Decree, not a party to the cause, who has not paid his purchase Money, from committing waste on the Property purchased.(b)

An *Injunction* to restrain setting up outstanding Terms in an Ejectment will not be granted on motion.(c)

An Order to dissolve the common *Injunction nisi*, may be obtained notwithstanding the Defendant has excepted to the Master's Report, as to the sufficiency of the Answer.(d)

Report on a Reference for Impertinence, needs no Confirmation, and where the Bill is reported not impertinent, Plaintiff is entitled to an *Injunction*, unless an Answer is actually filed.(e)

An Order to dissolve *Injunction nisi*, obtained after Exceptions filed to the Answer, is irregular.(f)

Where an *Injunction* has been granted on Merits; a Motion to amend, without Prejudice to the *Injunction*, is a Motion of course; but where it has issued on account of Delay, notice of the Motion must be given, and the proposed Amendments stated.(g)

(a) 1 Sim. and Stu. 366.

(b) 1 Sim. and Stu. 381.

(c) 1 Sim. and Stu. 419. ;

(d) 1 Sim. and Stu. 486.

(e) 3 Swanst. 232. n.

(f) 1 Sim. and Stu. 262.

(g) 1 Sim and Stu. 433.

Vol. i. p. 218, 422. *Depositions in Perpetuum.*

The Court will not order Copies of Depositions taken to perpetuate Testimony of Witnesses to be delivered out for the purpose of perfecting the Title to an Estate, even where the witnesses are dead.(a)

Vol. i. p. 406. *Opening Biddings.*

Where several Lots have been purchased by the same Person, and the Biddings are ordered to be opened as to some of them which were first purchased, the Purchaser will be allowed the Option of opening the Biddings as to the remainder.(b)

Vol. i. p. 527. *Contempt.*

Where a Defendant is in Contempt for want of an Answer, which is afterwards filed, if the Plaintiff accepts and acts on the Answer he waives the Contempt, and Defendant need not obtain an Order to discharge it before he moves to dismiss.(c)

Vol. i. p. 167. *Amendment of Bill, extra Costs.*

Where a Bill had been amended three times, and the two last Amendments were made necessary by the Error of the Plaintiffs, the Defendant was allowed extra Costs for those Amendments.(d)

Vol. i. p. 192. *Cross-Examination.*

A Party who examines a Witness in the Examiner's Office is bound to keep him in London forty-eight Hours after his Production at the seat of the adverse Clerk in

(a) 1 Sim. and Stu. 385.

(b) 1 Sim. and Stu. 386.

(c) 1 Sim. and Stu. 393.

(d) 1 Sim. and Stu. 421.

Court, and if Cross-Interrogatories are left with the Examiner, within the forty-eight Hours, the Party must keep the Witness in London till the Cross-Examination is finished: where a Witness left London before the forty-eight Hours were expired, the Party producing him was ordered to bring him back at his own Expense, or the Examination in chief to be suppressed.(a)

Vol. i. p. 240. *Setting down Cause.*

A Cause may be regularly set down *without consent*, in the Vacation after any Term in which Publication has passed.(b)

Vol. i. p. 224. *Examination to Credit.*

There is no precise Time beyond which Witnesses cannot be discredited. Interrogatories in support of Articles for that Purpose, may relate to particular Facts not in issue in the Cause, as well as to the Credit of the Witnesses generally.(c)

Vol. i. p. 422. *Purchasor.*

A Purchasor is not bound to compleat his Purchase without the Title Deeds; unless he has a legal Covenant to produce them; a Covenant to produce Title Deeds runs with the Land for the benefit of the Purchasor; but not for the benefit of the Vendors.(d)

Vol. ii. p. 173. *Motions and Notices.*

A Party making a successful Motion is entitled to his Costs as Costs in the Cause, but the Party opposing it is not in like manner entitled to his Costs: the Party making

(a) 1 Sim. and Stu. 446.

(c) 1 Sim. and Stu. 467.

(b) 1 Sim. and Stu. 466.

(d) 1 Sim. and Stu. 449.

a Motion which fails, is not entitled to his Costs, as Costs in the Cause; but the Party opposing it is entitled to his Costs as Costs in the Cause: where a Motion is made by one Party and not opposed by the other, the Costs of both Parties are Costs in the Cause. Wherever from special Circumstances it is not the Intention of the Court that the above Rule should apply, it is the Duty of the Court to give particular Directions as to Costs; but the Court very rarely gives any special Directions as to a Motion for obtaining, continuing, or dissolving an Injunction to stay Proceedings at Law, leaving the Costs of such Motions to abide the event of the Suit.(a)

Unless the Costs of a former Notice have been taxed, non-payment is not an Objection to a subsequent Motion.(b)

Vol. ii. p. 329. *Charity.*

Where a charity Information is filed under 52 Geo. 3. c. 91. Without a Relator the Court has Jurisdiction to order Defendant to pay the Attorney-General his Costs.(c)

Vol. i. p. 786. *Exceptions.*

Exceptions having been allowed to the Answer and the Bill amended, and the usual Order obtained that the Defendants should answer the Exceptions and Amendments at the same Time: when the Defendant put in a further Answer: The Plaintiff then took Exceptions to the further Answer, and entitled them "Exceptions to the further Answer to the original Bill, and to the Answer to the amended Bill;" the Exceptions were held to be irregularly intitled, and were ordered to be taken off the file; for that new Exceptions cannot be taken to the further answer to the original Bill; but if that Answer be considered in-

(a) 1 Sim. and Stu. 357.

(c) 1 Sim. and Stu. 394.

(b) 6 Madd. 68 n.

sufficient, it must be referred back to the Master upon the old Exceptions.(a)

Vol. i. p. 843. *Solicitor's Lien.*

A Solicitor, served with Subpoena duces tecum, who refused to allow a Deed in his possession to be proved on behalf of the Plaintiff, on the ground of Lien for Costs due from the Defendant; ordered to attend and produce before the Examiner the Deed in question, with the subscribing Witnesses thereto, at the expense of the Solicitor, and also the Costs of preparing and filling Interrogatories consequential to the Application, with the taxed Costs of the Motion and incidental thereto.(b)

A Solicitor who had refused to act any longer for a Party in the Cause, was ordered to permit the Party to inspect Papers in his possession at all reasonable Times, without any undertaking to proceed to a taxation of his Bill.(c)

Vol. i. p. 466. *Interesse Suo.*

An Examination *pro interesse suo* is conclusive, if not replied to, and cannot be brought before the Court upon Exception to the Report.(d)

Vol. i. p. 484. *Exceptions.*

After a Report of Impertinence and an Order to expunge, Exceptions may be taken to the Report; but an Application must be made to suspend or discharge the Order.(e)

(a) 1 Sim. and Stu. 426.

(d) 3 Swanst. 311. n.

(b) 1 Sim. and Stu. 455.

(e) 3 Swanst. 228.

(c) 1 Sim. and Stu. 282.



